TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 570.

WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, PETITIONERS,

vs.

UNITED FUEL GAS COMPANY, A CORPORATION.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED AUGUST 31, 1922.

(29,120)

(29,120)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 7, 1922.

Pleas Before the Supreme Court of Appeals of the State of West Virginia.

At a Regular Term of the Supreme Court of Appeals, held at harleston, Kanawha County, from the 11th day of January, 1922, o the 3rd day of June, 1922, both inclusive, the following order was ade and entered during said term on the 30th day of May, 1922, o wit:

Absent: Judge Lively.

4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

ALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

pon an Appeal from a Decree of the Circuit Court of Kanawha County, Pronounced on the 14th Day of September, 1920.

The mandate of the Supreme Court of the United States in the se lately pending therein, entitled United Fuel Gas Company vs. alter S. Hallanan, State Tax Commissioner, et al., having been resented to the Court on the 6th day of February, 1922, it is now rdered that the same be recorded in the Order Book of this Court. The said mandate is in words and figures as follows:

[SEAL.]

he President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Whereas, lately in the Supreme Court of Appeals of the State of est Virginia, before you, or some of you, in a cause between Walter Hallanan, State Tax Commissioner etc., et al., appellants and nited Fuel Gas Company, appellee, No. 4201, wherein the judgent of the said Supreme Court of Appeals, entered in said cause n the 26th day of November, A. D., 1920, is in the following ords, viz:

"The Court, having maturely considered the motion to reverse the decree aforesaid, the record thereof and the arguments of counsel thereon, is of opinion to, and for reasons ated in writing and filed with the record, and hereby doth, sustain id motion as to part of said decree and overrule said motion as to e remainder thereof. It is therefore adjudged, ordered and deeed that the decree of the Circuit Court of Kanawha County, ronounced in this cause on the 14th day of September, 1920, in so r, and in so far only, as it decrees and holds the Transportation ct, mentioned and described in the bill and proceedings in this

cause, being chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session held in 1919, to be void and perpetually inhibits, enjoins and restrains the appellants from enforcing or attempting to force against the appellee, in any manner or respect, the provisions of said act in so far as the same apply to intrastate commerce as defined by the written opinion filed herein, be and the same hereby is set aside, reversed and annulled, and that in all other respects said decree be and the same hereby is affirmed, and that the appellee do pay to the appellants their costs about the prosecution of their appeal in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County," as by the inspection of the transcript of the record of the said Supreme Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears,

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the Judgment of the said Supreme Court of Appeals in this cause be, and the same is hereby, reversed with costs;

and that the said appellee, United Fuel Gas Company, re-
3 cover against the said appellants Four Hundred and forty-nine dollars and seventy-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court of Appeals for further proceedings not inconsistent with the opinion of this Court. December 12, 1921.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of Appeals of the State of West Virginia, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, and fourth day of February, in the year of our Lord one thousand nine hundred and twenty-two.

Costs of appellee:

Clerk	$140.15
Printing Record	289.60
Attorney	20.00
	$449.75

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

And the Court takes time to consider of the final order to — entered in this cause.

At another day, to wit, on the 2nd day of June, 1922, and during the regular term of said Court as aforesaid, the following order was made and entered in this cause:

Absent: Judge Lively.

4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County, Pronounced on the 14th Day of September, 1920.

The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered
4 and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County.

STATE OF WEST VIRGINIA:

I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, do hereby certify that the foregoing is a true copy of all of the record and proceedings in the therein entitled cause since the receipt of the mandate of the Supreme Court of the United States as the same remains upon the records and files of the said Supreme Court of Appeals, and that no written opinion was filed in connection with the foregoing orders.

In testimony whereof, I hereto set my hand and affix the seal of the said Supreme Court of Appeals of West Virginia, at Charleston, Kanawha County, this 18th day of August, 1922, and in the 60th year of the State.

[Seal of the Supreme Court of Appeals, West Virginia.]

WM. B. MATHEWS,
Clerk Supreme Court of Appeals,
By R. A. POFFENBARGER,
Deputy Clerk.

5 [Endorsed:] In the Supreme Court of the United States. Walter S. Hallanan and E. T. England vs. United Fuel Gas Company. Record.

Endorsed on cover: File No. 29,120. West Virginia Supreme Court of Appeals. Term No. 570. Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, petitioners, vs. United Fuel Gas Company, a Corporation. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1922. File No. 29,120.

No. 570

OCTOBER TERM 1927

IN THE

Supreme Court of the United States

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia, and E. T. ENGLAND, Attorney General of the State of West Virginia,

Petitioners,

against

UNITED FUEL GAS COMPANY, a corporation,

Respondent.

MOTION FOR WRIT OF CERTIORARI AND NOTICE OF MOTION.

E. T. England, *Attorney General of West Virginia,*

S. B. Avis,

William G. Matthews,

Fred C. Blue,

Counsel for Petitioners,

Charleston, West Virginia.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia and E. T. ENGLAND, Attorney General of the State of West Virginia, Petitioners, AGAINST UNITED FUEL GAS COMPANY, a corporation. Respondent.	No. 570.

MOTION FOR WRIT OF CERTIORARI.

And now come the petitioners above named by E. T. England, Attorney General of the State of West Virginia, S. B. Avis, William G. Mathews and Fred O. Blue, their counsel, and move this court, upon the petition of Walter S. Hallanan, State Tax Commissioner of the State of West Virginia and E. T. England, Attorney General of the State of West Virginia, petitioners, sworn to on the 31st day of August, 1922, a certified copy of the entire transcript of the record in this cause, including the proceedings in the Supreme Court of Appeals of the State of West Virginia since the mandate of this Honorable Court, dated the 4th day of February, 1922, and the petitioners' brief therewith, filed on the 31st day of August, 1922, for a Writ of Certiorari, to be directed to the Supreme Court of Appeals of the State of West Virginia to review the final decree and judgment of said court rendered in the cause of United Fuel Gas Company, a corporation, against said petitioners on the 2nd day of June, 1922,

to the end that said final decree and judgment of said Supreme Court of Appeals of West Virginia, in so far as it denied said petitioners, as the agents and representatives of the State of West Virginia, the right to levy and collect the tax of one-third of one cent for each thousand cubic feet of 11,358,837 M. cubic feet of natural gas transported within the State of West Virginia for the period in question, amounting to and involving $37,962.79, should be set aside, reversed and annulled and that such further proceedings in said cause shall be had as to justice shall appertain.

E. T. England, *Attorney General of West Virginia,*

S. B. Avis,

William G. Mathews,

Fred O. Blue,

Counsel for Petitioners,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia and E. T. ENGLAND, Attorney General of the State of West Virginia, Petitioners, AGAINST UNITED FUEL GAS COMPANY, a corporation. Respondent.	No. 570.

Dear Sirs:

Please take notice, that upon the petition of Walter S. Hallanan, State Tax Commissioner of the State of West Virginia and E. T. England, Attorney General of the State of West Virginia, a certified copy of the entire transcript of the record in this cause, including the proceedings in the Supreme Court of Appeals of the State of West Virginia since the mandate of the Supreme Court of the United States, dated the 4th day of February, 1922, and the petitioners' brief therewith, filed on the 31st day of August, 1922, we shall move the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, District of Columbia, on Monday, 2nd day of October, 1922, at the opening of the court on that day, or as soon thereafter as counsel can be heard, and that we shall then and there move for such further relief in the premises as may be just.

Dated Charleston, West Virginia, September 11, 1922.

E. T. England, *Attorney General*
of West Virginia,
S. B. Avis,
William G. Mathews,
Fred O. Blue,
Counsel for Petitioners,
Charleston, West Virginia.

To:
Malcolm Jackson,
R. G. Altizer,
Charleston, West Virginia.
Counsel for United Fuel Gas Company,
a corporation, Respondent.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 570.

WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL, OF THE STATE OF WEST VIRGINIA, PETITIONERS,

vs.

UNITED FUEL GAS COMPANY, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

To the Honorable William H. Taft, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, respectfully show that they are aggrieved

by a final decree of the Supreme Court of Appeals of the State of West Virginia in a suit in equity brought by said United Fuel Gas Company, as plaintiff, against your petitioners, which final decree was made and entered by said Supreme Court of Appeals of West Virginia at its January term, 1922, to wit, on the 2d day of June, 1922, by which said final decree said Supreme Court of Appeals of West Virginia failed and refused to give due effect to, and to carry into execution, the mandate of this honorable court in said cause, in conformity to the opinion and judgment of this honorable court, which mandate was dated the 4th day of February, 1922, and which decision and order of this honorable court was made and entered on the 12th day of December, 1921.

Your petitioners further represent that they made application by their attorneys to the said Supreme Court of Appeals of West Virginia to execute the mandate aforesaid in conformity with the judgment and decree and the opinion of this honorable court.

Statement and the General Reasons Relied on for the Allowance of a Writ of Certiorari.

On the 26th day of November, 1920, a decree was made and entered by the Supreme Court of Appeals of West Virginia (that being the highest court of that State) affirming in part and reversing in part a decree made and entered by the Circuit Court of Kanawha County, West Virginia, on the 14th day of September, 1920, in a suit in equity wherein your petitioners were defendants and United Fuel Gas Company was plaintiff, which decree first named was made absolute and final by an order of said Supreme Court of Appeals of West Virginia entered January 12, 1921.

A writ of error directed to the said Supreme Court of Appeals of West Virginia to review its said final decree was duly allowed and awarded by this honorable court upon a petition filed by the respondent. The cause came on to be heard by this honorable court and was argued on the 9th and 10th days of November, 1921, and was decided on the 12th day of December, 1921. This honorable court reversed said last-mentioned final decree of the Supreme Court of Appeals of West Virginia, and the cause was remanded to said Supreme Court of Appeals of West Virginia for further proceedings not inconsistent with the opinion of this honorable court.

For reasons given by this honorable court in The Eureka Pipe Line Company against your petitioners and decided by this honorable court on said 12th day of December, 1921, the writ of error was entertained and reference made to the fact that the case of The Eureka Pipe Line Company against your petitioners and this cause were heard together and disposed of in a single opinion by the said Supreme Court of Appeals.

The bill in the original suit was to prevent the enforcement against United Fuel Gas Company of a statute of West Virginia (Acts of 1919, extraordinary session, chap. 5) that forbids engaging in the business of transporting natural gas in pipe lines without the payment of a tax of one-third of one cent for each thousand cubic feet of gas transported. The said Circuit Court of Kanawha County held that the statute was void.

It was decided by the said Supreme Court of Appeals, when said cause was originally before it, that the act, chapter 5 of the Acts of the Legislature of West Virginia, extraor-

dinary session, 1919, imposing a tax upon the business of engaging in the transportation of oil and gas by pipe lines, in question was valid as to intrastate business, as defined in the opinion, and that the tax, one-third of one cent for each thousand cubic feet of natural gas transported, could be levied on quantities aggregating 34,157,952 M cubic feet of natural gas transported for the period in question, in intrastate commerce, as defined in the opinion of said Supreme Court of Appeals. Of said quantity of 34,157,952 M cubic feet of natural gas, 7,567,353 M cubic feet was sold to the Columbia Gas and Electric Company; 7,961,333 M cubic feet to the Hope Natural Gas Company, and 7,270,429 M cubic feet to the Pittsburgh West Virginia Company. And it was held by this honorable court that the gas so sold to said three companies was interstate commerce and not intrastate commerce, as held by said Supreme Court of Appeals.

In the opinion of this honorable court, it was said:

> "That the necessities of business requiring a much smaller amount destined to points within the State to be carried undistinguished in the same pipes, does not affect the character of the major transportation."

The said final order of said Supreme Court of Appeals made and entered on the 2d day of June, 1922, in effect denies to the State of West Virginia the right to levy and collect the tax on 11,358,837 M cubic feet of natural gas transported in intrastate commerce for the period in question, which amounts to and involves $37,862.79, which is the amount in dispute for the period in question, and restrains your petitioners, as the agents and representatives of the State of West Virginia, from levying and collecting said tax for said period.

Your petitioners are further advised and represent that said final order of said Supreme Court of Appeals made and entered on the 2d day of June, 1922, denied to them, as the agents and representatives of the State of West Virginia, a right or privilege especially set up and claimed under an authority exercised under the United States, contrary to the provisions of section 237 of the Judicial Code, as amended by the act of September 6, 1916.

Your petitioners further represent that all of said questions were before your honorable court in said cause and were disposed of by its judgment, decree, and opinion, and said Supreme Court of Appeals had no right to vary said judgment and decree upon any matter decided by this honorable court or to intermeddle with it further than to settle so much as was remanded, and had no right to question matters to which it had not been reversed.

Your petitioners are advised that the effect of said judgment, decree, and opinion of this honorable court was to affirm so much of the decree of the said Supreme Court of Appeals of West Virginia as permitted and authorized your petitioners, as the agents and representatives of the State of West Virginia, to levy and collect the tax in question on said 11,358,837 M cubic feet of natural gas, or a total sum of $37,862.79.

Your petitioners present herewith as an exhibit to and part of this petition a certified copy of the entire transcript of record of the case, including the proceedings in the said Supreme Court of Appeals of West Virginia subsequent to the said mandate of this honorable court, and make the same a part of this petition.

Your petitioners, therefore, respectfully pray that a writ of certiorari be issued out of and under the seal of this

honorable court, directed to the Supreme Court of Appeals of West Virginia, commanding said court to certify and send to this honorable court on a day certain, to be therein designated, a full and complete transcript of the record and of all proceedings of said Supreme Court of Appeals of West Virginia in said cause subsequent to said mandate, which was entitled in that court, to the end that said cause may be reviewed and determined by this honorable court, as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate, and that said final decree of the said Supreme Court of Appeals of West Virginia made and entered on the 2d day of June, 1922, should be set aside, reversed, annulled, and modified, and that such further proceedings in said cause shall be had as to justice shall appertain.

And your petitioners will ever pray, etc.

Dated August 31, 1922.

WALTER S. HALLANAN,
State Tax Commissioner of the State of West Virginia,
E. T. ENGLAND,
Attorney General of the State of West Virginia,
By COUNSEL.

E. T. ENGLAND,
Attorney General of West Virginia.
S. B. AVIS,
WM. G. MATHEWS,
FRED O. BLUE,
Counsel.

DISTRICT OF COLUMBIA, *ss:*

S. B. AVIS, being duly sworn, says that he is one of counsel for Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, the petitioners herein; that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

S. B. AVIS.

Sworn to and subscribed before me this 31st day of August, A. D. 1922.

[Seal of Earl W. Cooper, Notary Public, District of Columbia.]

EARL W. COOPER,
Notary Public in and for the District of Columbia.

My commission expires Dec. 12, 1924.

I hereby certify that I have examined the foregoing petition, and, in my opinion, the petition is well founded, and that this cause is one in which the prayer of the petitioners should be granted by the Supreme Court of the United States.

Dated August 31, 1922.

FRED O. BLUE,
Of Counsel for Petitioners.

[Endorsed:] In the Supreme Court of the United States. Walter S. Hallanan and E. T. England *vs.* United Fuel Gas Company. Petition for writ of certiorari.

IN THE SUPREME COURT OF THE UNITED STATES.

WALTER S. HALLANAN, *State Tax Commissioner,* and E. T. ENGLAND, *Attorney General, of the State of West Virginia, Petitioners,*

vs.

UNITED FUEL GAS COMPANY, *a Corporation, Respondent.*

BRIEF OF WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL, OF THE STATE OF WEST VIRGINIA, IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI.

The mandate is the law of the case, and the Supreme Court of Appeals of West Virginia had no right to vary the judgment and decree of the Supreme Court of the United States upon any matter decided on writ of error; had no right to intermeddle with it further than to settle so much as was remanded, and they were bound to proceed and dispose of the case in conformity to the opinion of the Supreme Court of the United States.

We submit that the final decree of the Supreme Court of Appeals of West Virginia, made and entered on the 2d day of June, 1922, in effect evades the directions given by this honorable court and practically reverses the judgment and decree which the mandate directed them to execute.

The subordinate court is bound to proceed in such an event and dispose of the case as directed, and they have no

power *either to evade or reverse* the judgment of the Supreme Court of the United States, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial power conferred by the Constitution into effect.

In *Sibbald v. United States,* 12 Pet., 488; 9 L. Ed., 1167, the Supreme Court of the United States held:

> "When the Supreme Court have executed their power in a case before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but will send a special mandate to the court below to award it. Whatever was before the court and is disposed of, is considered finally settled. The inferior court is bound by the decree, as the law of the case; and must carry it into execution according to the mandate; they can examine it for no other purpose than execution, or give any other or further relief; or review it upon any matter decided on appeal, for error apparent; or intermeddle with it further than to settle so much as has been remanded.
>
> "After a mandate, no rehearing will be granted, and on a subsequent appeal, nothing is brought up but the proceedings subsequent to the mandate.
>
> "If the special mandate directed by the 24th section of the Judiciary Act is not obeyed, then the general power given to 'all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,' by the 14th section of the Judiciary Act, fairly arises; and a *mandamus* or other appropriate writ will go." (Italics ours.)

In *Gaines v. Caldwell,* 148 U. S., 228; 37 L. Ed., 432, the court held that *where the lower court is reversed in part*

only and the cause remanded for further proceedings in regard to specified facts, the lower court is confined to such facts, and cannot question matters as to which it had been reversed, and that the lower court may consider any matters left open by the mandate; *but where the merits of the case have been acted upon in the appellate court the lower court cannot reconsider them.*

In the opinion in *Gaines v. Caldwell, supra,* the court, at pages 239, 240, said:

> "Obeying the mandate of this court and proceeding in conformity with its opinion, in the present case, were not matters within the discretion of the circuit court; and, therefore, the cases which hold that this court will not direct in what manner the discretion of an inferior tribunal shall be exercised do not apply to the present case. The opinion of this court proceeded distinctly upon an approval by it of the action of the circuit court in respect to the title and the possession, and a disapproval only of the method of accounting. * * *
>
> "It is contended for the respondent that the decree of this court was one absolutely reversing the decree of the circuit court; that the circuit court had a right, therefore, to proceed in the case, in the language of the mandate, not merely 'in conformity with the opinion and decree of this court,' but also 'according to right and justice;' and that, therefore, it had authority to permit the defendant Rugg to take further testimony in support of his exceptions, 'by way of defense to the title to the lands in controversy,' and to set down the cause 'upon the issues formed by the pleadings and exceptions aforesaid as to the title to said lands;' in other words, that the whole controversy was to be reopened as if it had never been

passed upon by this court as to the title and possession of the land. This cannot be allowed, and is not in accordance with the opinion and mandate of this court."

In *West v. Brashear,* 14 Pet., 51, 54; 10 L. Ed., 350, 351, the court said:

> "There has been some discussion at the bar as to the principles by which a circuit court of the United States is to be governed when executing a mandate from the Supreme Court. Undoubtedly, the mandate must be its guide. *It is the judgment of this court transmitted to the circuit court.* And when the direction contained in the mandate is precise and unambiguous, *it is the duty of the circuit court to carry it into execution, and not to look elsewhere for authority to change its meaning.*" (Italics ours.)

In delivering the opinion of the court, *Macgwire v. Tyler,* 17 Wall., 253; 21 L. Ed., 576, Mr. *Justice* Clifford said:

> "By the directions of the mandate they were as much bound to proceed and dispose of the case *in conformity to the opinion of this court* as to reverse their former decree. But instead of that *they entered a new decree dismissing the petition, which in effect evades the directions given by this court and practically reverses the judgment and decree which the mandate directed them to execute.* Argument, to show that a subordinate court is bound to proceed in such an event and dispose of the case as directed *and that they have no power either to evade or reverse the judgment of this court, is unnecessary, as any other rule would operate as a repeal of the Constitution and the laws of Congress passed to carry the judicial* power conferred by the Constitution into effect." (Italics ours.)

Mr. *Justice* Clifford further said:

> "And it is clear that it is not competent even for this court, after the term expired, to review and reverse such a decree."

Mr. *Justice* Clifford also said:

> "On receipt of a mandate it is the duty of the subordinate court to carry it into execution even though the jurisdiction do not appear in the pleadings." (Citing numerous cases.)

Mr. *Justice* Clifford further stated:

> "Judging from the proceedings of the State court under the former mandate and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate. Such being the fact, the duty of this court is plain and not without an established precedent. * * * Suffice it to say the rule is there settled, that where the cause has once before been remanded and the State court declines or refuses to carry into effect the mandate of the Supreme Court, the court will proceed to a final decision of the same and award execution to the prevailing party."

In a note to 8 Enc. U. S. Supreme Court Reports, at pages 130-131, the law in this connection is stated as follows:

> "No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, *for errors of fact or law,* after the term in which they have been rendered, unless for clerical mistakes (Cameron *v.* M'Roberts, 3 Wheat., 591; 4 L. Ed., 467; Bank *v.*

Wistar, 3 Pet., 431; 7 L. Ed., 731; Sibbald *v.* United States, 12 Pet., 488; 9 L. Ed., 1167) or to reinstate a cause dismissed by mistake (The *Palmyra,* 12 Wheat., 1, 10; 6 L. Ed., 531), from which it follows, that no change or modification can be made, which may substantially vary or affect it in any material thing * * * Whatever was before the court, and it disposed of, is considered as finally settled. *The inferior court is bound by the decree as the law of the case;* and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. After a mandate, no rehearing will be granted, and on a subsequent appeal, nothing is brought up, but the proceeding subsequent to the mandate. Himely *v.* Rose, 5 Cranch, 313; 3 L. Ed., 111; Browder *v.* McArthur, 7 Wheat., 58, 59; 5 L. Ed., 397; The *Santa Maria,* 10 Wheat., 431, 443; 6 L. Ed., 359; Illinois *v.* Illinois Cent. R. Co., 184 U. S., 77, 91; 46 L. Ed., 440. See also, Phillips *v.* Negley, 117 U. S., 665, 674; 29 L. Ed., 1013."

In *Durant v. Starrow,* 101 U. S., 555; 25 L. Ed., 961, it s held:

"On a mandate from this court affirming a decree, the circuit court can only record our order and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. Our judgment by a divided court is just as much our judgment for all the purposes of the case in hand as if it had been unanimous. The result of the appeal to us was an affirmance of what had been done below. After the appeal was taken, the power of the court below over its own decree was

> gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution. We might have ordered a modification so as to declare that the dismissal should be without prejudice. We did not do so. The circuit court had no power after that to do what we might have done and did not do."

The decision of the Supreme Court of Appeals of West Virginia in this case was made and rendered on November 26, 1920. That term has long since ended. The order here complained of was entered by the Supreme Court of Appeals of West Virginia at the January term, 1922, to wit, on the 2d day of June, 1922. The decision of your honorable court in this case was made and rendered at the October term, 1921, and the mandate was sent down on the 4th day of February, 1922.

In the opinion of this honorable court it was held that the tax in question may be levied in respect of the oil and gas used in West Virginia.

We submit that the legal character and effect of the decision of this honorable court were henceforth *res adjudicata* and not further open for question or reconsideration by the Supreme Court of Appeals of West Virginia or even by this honorable court.

In *Holleran v. Meisel,* 91 Va., 143, 148; 21 S. E., 659, the cases are collected and cited to show the following proposition of law:

> "When this court has construed the legal character and effect of certified copies of entries in certain public records, which involves the construction of the records themselves, *such construction is res adjudicata in this court and all the courts of this State.*"

In delivering the opinion in this case, Reily, *J.*, said:

> "When such decision was made and certified to the circuit court, *the legal character and effect of said entry or memorandum was henceforth res adjudicata and not further open for question or reconsideration by the circuit court, or even by this court.* We think that the construction thus placed on it was correct; but whether correct or not *it is to that extent the law of this case. It was the mandate of this court to the lower court,* and the paper or entry was henceforth not to be treated as a grant or patent. This is well settled by the decisions of this court, and of other courts of highest authority." (Citing a large number of cases, including *Tyler v. Macgwire, supra,* and *West v. Brashear, supra.*) (Italics ours.)
>
> "Where a decree after an accounting was 'reversed, and the case remanded with instructions to strike out allowances for rental' before a certain date, and to allow subsequent rentals, it was held: *That this in effect affirmed so much of the decree as allowed these second rentals; that the court below had no power to reopen* the inquiry into the accounts." Kneeland *v.* Am. Loan & T. R. Co., 136 U. S., 89, 103; 34 L. Ed., 379, 385. (Italics ours.)

In *Chaires v. United States,* 3 How., 611; 11 L. Ed., 749, it was held:

> "Where this court has affirmed the title to lands in Florida, and referred, in its decree, to a particular survey, *it would not be proper for the court below to open the case for a rehearing,* for the purpose of adopting another survey.
>
> *"The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done."*

In delivering the opinion in this case *Mr. Justice* Catron said:

> "But the duties of the court did not end here; by the 2d section of the Act of 1824 it was not only given full power and authority *to hear and determine all questions arising in the cause* relative to the validity of the title * * *.
>
> "For this purpose the petition for a rehearing was filed, seeking to have the decree of 1830 reformed, and that part of it establishing locality and boundaries set aside or disregarded, and the land located elsewhere. *This the Circuit Court of East Florida had no power to do,* on the facts set forth by the petition, *because the decree of this court, made in affirmance of that made below, is conclusive on the inferior court; and it has no authority to disturb it by the mode proposed, but can* only execute our mandate, and settle so much as remains to be done." (Italics ours.)

Respectfully submitted,

E. T. ENGLAND,
Attorney General of West Virginia;
S. B. AVIS,
WM. G. MATHEWS,
FRED O. BLUE,
Counsel for Petitioners.

[Endorsed:] In the Supreme Court of the United States. Walter S. Hallanan and E. T. England vs. United Fuel Gas Company. Brief in support of petition for writ of certiorari.

(7180)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 886.

WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, PLAINTIFFS IN ERROR,

vs.

UNITED FUEL GAS COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED MARCH 3, 1913.

(29,436)

(29,436)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 886.

WALTER S. HALLANAN, STATE TAX COMMISSIONER, AND E. T. ENGLAND, ATTORNEY GENERAL OF THE STATE OF WEST VIRGINIA, PLAINTIFFS IN ERROR,

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UNITED FUEL GAS COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 5, 1923.

1 Pleas Before the Supreme Court of Appeals of the State of West Virginia.

At a Regular Term of the Supreme Court of Appeals, held at Charleston, Kanawha County, from the 11th day of January, 1922, to the 3rd day of June, 1922, both inclusive, the following order was made and entered during said term on the 30th day of May, 1922, to-wit:

Absent: Judge Lively.

ORDER FILING MANDATE.

[Filed May 30, 1922.]

4201.

UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County Pronounced on the 14th Day of September, 1920.

The mandate of the Supreme Court of the United States in the case lately pending therein, entitled United Fuel Gas Company vs. Walter S. Hallanan, State Tax Commissioner, et al., having been presented to the Court on the 6th day of February, 1922, it is now ordered that the same be recorded in the Order Book of this Court. The said mandate is in words and figures as follows:

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Whereas, lately in the Supreme Court of Appeals of the State of West Virginia, before you, or some of you, in a cause between Walter S. Hallanan, State Tax Commissioner etc., et al., appellants, and United Fuel Gas Company, appellee, No. 4201, wherein the judgment of the said Supreme Court of Appeals, entered in said cause on the 26th day of November, A. D., 1920, is in the following words, viz:

"The Court, having maturely considered the motion to re-
2 verse the decree aforesaid, the record thereof and the arguments of counsel thereon, is of opinion to, and for reasons stated in writing and filed with the record, and hereby doth, sustain

said motion as to part of said decree and overrule said motion as to the remainder thereof. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, in so far, and in so far only, as it decrees and holds the Transportation Act, mentioned and described in the bill and proceedings in this cause, being chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session held in 1919, to be void and perpetually inhibits, enjoins and restrains the appellants from enforcing or attempting to enforce against the appellee, in any manner or respect, the provisions of said act in so far as the same apply to intrastate commerce as defined by the written opinion filed herein, be and the same hereby is set aside, reversed and annulled, and that in all other respects said decree be and the same hereby is affirmed, and that the appellee do pay to the appellants their costs about the prosecution of their appeal in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County."

as by the inspection of the transcript of the record of the said Supreme Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears,

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court of Appeals in this cause be, and the same is hereby, reversed with costs;

and that the said appellee, United Fuel Gas Company, re-
3 cover against the said appellants Four Hundred and forty-nine dollars and seventy-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court of Appeals for further proceedings not inconsistent with the opinion of this Court. December 12, 1921.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of Appeals of the State of West Virginia, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the fourth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

Costs of appellee:

Clerk	$140.15
Printing Record	289.60
Attorney	20.00
	$449.75

And the Court takes time to consider of the final order to be entered in this cause.

At another day, to-wit, on the 2nd day of June, 1922, and during the regular term of said Court as aforesaid, the following order was made and entered in this cause:

Absent: Judge Lively.

FINAL ORDER ON MANDATE.

[Filed June 2, 1922.]

[Title omitted.]

Upon an Appeal from a Decree of the Circuit Court of Kanawha County Pronounced on the 14th Day of September, 1920.

The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered
4 and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County.

5 **PETITION FOR WRIT OF ERROR.**

Supreme Court of the United States.

In Equity.

UNITED FUEL GAS COMPANY, Plaintiff Below, Defendant in Error,

vs.

WALTER S. HALLANAN, State Tax Commissioner, and E. T. ENGLAND, Attorney General of the State of West Virginia, Defendants Below, Plaintiffs in Error.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Appeals of the State of West Virginia.

To the Honorable William H. Taft, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Now come the above named Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, plaintiffs in error, as aforesaid, and represent that at the October Term, 1921, of the Supreme Court of the United States, the case of the United Fuel Gas Company, Plaintiff in Error, vs. Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, was argued and determined, and thereupon the following mandate was issued and transmitted to the Supreme Court of Appeals of the State of West Virginia, to-wit:

"UNITED STATES OF AMERICA, *ss:*

[SEAL]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

6 Whereas, lately in the Supreme Court of Appeals of the State of West Virginia, before you, or some of you, in a cause between Walter S. Hallanan, State Tax Commissioner et al., appellants, and the United Fuel Gas Company, appellee, No. 4201, wherein the judgment of the said Supreme Court of Appeals, entered in said cause on the 26th day of November, A. D. 1920, is in the following words, viz:

"The Court, having maturely considered the motion to reverse the decree aforesaid, the record thereof and the arguments of counsel thereon, is of opinion to, and for reasons stated in writing and filed with the record, and hereby doth, sustain said motion as to part of said decree and overrule said motion as to the remainder thereof. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the

14th day of September, 1920, in so far, and in so far only, as it decrees and holds the Transportation Act, mentioned and described in the bill and proceedings in this cause, being Chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session of 1919, to be void and perpetually inhibits, enjoins and restrains the appellants from enforcing or attempting to enforce against the appellee, in any manner or respect, the provisions of said act in so far as the same apply to intrastate commerce as defined by the written opinion filed herein, be and the same hereby is set aside, reversed and annulled, and that in all other respects said decree be and the same hereby is affirmed, and that the appellee do pay to the appellants their costs about the prosecution of their appeal in this court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County."

as by the inspection of the transcript of the record of the said Supreme Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And Whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that the said appellee, United Fuel Gas Company, recover against the said appellants Four Hundred Forty-nine Dollars and seventy-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court of Appeals for further proceedings not inconsistent with the opinion of this Court.

December 12, 1921.

And the same is hereby remanded to you, the said Judges of the said Supreme Court of Appeals of the State of West Virginia,
7 in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, the fourth day of February, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

Cost of appellee:

Clerk	$140.15
Printing Record	289.60
Attorney	20.00
	$449.75

Your petitioners further represent that they made application, by their attorneys, to the said Supreme Court of Appeals of West Virginia to execute the mandate aforesaid in conformity with the judgment and decree, and the opinion, of this Honorable Court. Your petitioners further represent that said Supreme Court of Appeals refused and failed to execute said mandate in conformity with the judgment and decree, and the opinion, of this Honorable Court, but at its January Term 1922, to-wit, on the 2d day of June, 1922, and at a term thereof long subsequent to the end of the term at which its said final order and mandate of November 26, 1920 was entered, said Supreme Court of Appeals made and entered the following final order and decree in said cause, to-wit:

4201.

"UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,

vs.

WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.

Upon an Appeal from a Decree of the Circuit Court of Kanawha County, Pronounced on the 14th Day of September, 1920.

The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920,
8 be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County."

Your petitioners are advised, and therefore further present, that by making and entering the order aforesaid, the said Supreme Court of Appeals failed to give the effect to, and to carry into execution, the mandate of this Honorable Court, which is the law of the case, in conformity to the opinion and judgment of this Honorable Court, and therefore denied the validity of an authority exercised under the United States contrary to the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6th, 1916.

Your petitioners further represent that it was decided by the said Supreme Court of Appeals, when said cause was originally before it, that the statute, Chapter 5 of the Acts of the Legislature of West Virginia, Extraordinary Session, 1919, imposing a tax upon the business of engaging in the transportation of oil and gas by pipe lines, in question, is valid, and that the tax, one-third of one cent for each thousand cubic feet of natural gas transported, could be levied on quantities aggregating 34,157,952 M cubic feet of natural gas transported for the period in question, in intrastate commerce, as defined

in the opinion of said Supreme Court of Appeals. Of said 34,157,-952 M cubic feet of natural gas, it was expressly stipulated and agreed by the parties to the suit that 11,590,650 M cubic feet thereof were sold to consumers in the State of West Virginia; and that at least ninety-eight per cent of said 11,590,650 M cubic feet were produced from lands in the State of West Virginia—so that, of said 34,-159,952 M. cubic feet of natural gas at least 11,358,837 M cubic feet were produced from lands located in the State of West Virginia and transported and sold by by the United Fuel Gas Company to consumers in the State of West Virginia. Of said 34,157,952 M cubic feet of natural gas 7,567,353 M. cubic feet were sold to the Columbia Gas and Electric Company, 7,961,333 M cubic feet to the
9 Hope Natural Gas Company and 7,270,429 M cubic feet to Pittsburg-West Virginia Gas Company. And it was held by this Honorable Court that the gas so sold to said three companies was interstate commerce, and not intrastate commerce, as held by said Supreme Court of Appeals; it was said in the opinion of this Honorable Court that:

"There were sold directly to consumers in West Virginia 11,590,-656 M cubic feet; a little over 10,000,000 M cubic feet to consumers in other states; and the remainder was sold to four connecting companies. It is admitted that the gas sold to one of these, the Ohio Fuel Supply Company, is transported in interstate commerce, so that that may be laid on one side. Another of them is the Columbia Gas & Electric Company. Ninety-nine per cent of the gas received by it is carried out of the state and sold, yearly. A third is the Pittsburgh-West Virginia Gas Company, which yearly disposes of 88 per cent of the gas in the same way. The fourth is the Hope Natural Gas Company, which in like manner carries 67 per cent of the gas bought from the plaintiff out of the state and sells it there.

"In short, the great body of the gas starts for points outside the state and goes to them. That the necessities of business require a much smaller amount destined to points within the state to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers, after they receive it, might change their minds before the gas leaves the state, and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the states, and theoretical possibilities may be left out of account. There is no break, no period of deliberation, but a steady flow, ending, as contemplated from the beginning, beyond the state line."

The said final order of said Supreme Court of Appeals in effect denies to the State of West Virginia the right to levy and collect the tax on at least 11,358,837 M cubic feet of natural gas transported in intrastate commerce for the period in question, at the rate of one-third of one per cent for each thousand cubic feet thereof, which amounts to and involves $37,862.79, which is the amount in dispute

for said period, and restrains your petitioners, as the agents and representatives of the State of West Virginia, from levying and collecting said tax for said period.

Your petitioners further represent that all of said questions
10 were before your Honorable Court in said cause, and were disposed of by its judgment, decree and opinion, and said Supreme Court of Appeals had no right to vary said judgment and decree upon any matter decided on writ of error; or intermeddle with it, further than to settle so much as was remanded, and cannot question matters to which it had not been reversed. The effect of the said judgment, decree and opinion of this Honorable Court was to affirm so much of the decree of the said Supreme Court of Appeals as permitted and authorized your petitioners, as the agents and representatives of the State of West Virginia, to levy and collect the tax on said 11,358,837 M cubic feet of natural gas, or a total sum of $37,862.79.

That your petitioners were, and are, aggrieved by said final order and decree of said Supreme Court of Appeals of West Virginia for their errors aforesaid to the prejudice of your petitioners, will more fully appear from the assignment of error which is filed herewith.

Wherefore, your petitioners pray that a writ of error from the Supreme Court of the United States may issue in this cause to the Supreme Court of Appeals of West Virginia for the correction of the errors so complained of, that a supersedeas may be allowed, and that a transcript of the record, proceedings and papers in this cause, subsequent to said mandate, duly authenticated by the Clerk of said Supreme Court of Appeals of West Virginia, may be sent to the said Supreme Court of the United States, as provided by law; that said final order and judgment of said Supreme Court of Appeals, made and entered on the 2nd day of June, 1922, may be re-examined and reversed, and that such other or further proceedings may be had in the premises as may be just and proper. Walter S. Hallanan, State Tax Commissioner of the State of West Virginia; E. T. England, Attorney General of the State of West Virginia, Petitioners. E. T. England, Attorney General of West Virginia; S. B. Avis, William Gordon Matthews, Fred. O. Blue, Attorneys for Petitioners.

ORDER ALLOWING WRIT OF ERROR.

Writ of error allowed upon the execution of a bond by the petitioners, in the sum of one thousand dollars. Said bond, when approved, not to operate as a supersedeas.

Dated, August 28, 1922. William R. Day, Associate Justice of the Supreme Court of the United States.

10½ [Endorsement omitted.]

11 Supreme Court of the United States.

[Title omitted.]

ASSIGNMENT OF ERROR.

(Filed Aug. 18, 1922.)

And now come the above named petitioners and plaintiffs in error, by their attorneys, whose names are hereunto signed, and in connection with their petition for a writ of error herein, say that in the records and proceedings and in the rendering of the decree of the Supreme Court of Appeals of West Virginia, entered in the above entitled cause, on, to-wit, the 2nd day of June, A. D. 1922, manifest error has intervened, to the prejudice of these petitioners and plaintiffs in error, in this, to-wit:

It was error for the said Supreme Court of Appeals to fail to give due effect to, and to carry into execution, the mandate of this Honorable Court, in conformity to the opinion and judgment of this Honorable Court and thereby deny to these petitioners and plaintiffs in error the validity of an authority exercised under the United States contrary to the provisions of Section 237 of the Judicial Code, as amended by the Act of September 6, 1916, in this—that the final order of said Supreme Court of Appeals, entered at its January Term, 1922, and at a term thereof long subsequent to the end of the term at which its final order and mandate of November 26, 1920, was entered, to-wit, on the 2nd day of June, A. D. 1922, restrained your petitioners and plaintiffs in error as the agents and representatives of the State of West Virginia, from levying and collecting one-third of one cent for each thousand cubic feet of 11,358,837 M
12 cubic feet of natural gas transported in intrastate commerce, within the State of West Virginia, amounting to and involving $37,962.79 for the period in question; this Honorable court not having reversed the decree of the Supreme Court of Appeals entered in this cause on the 26th day of November, A. D. 1920, in respect to said 11,358,837 M cubic feet of natural gas transported in intrastate commerce within the State of West Virginia.

Wherefore the said Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, petitioners and plaintiffs in error as aforesaid, pray that the said decree of said Supreme Court of Appeals of West Virginia, entered in the above entitled cause, on, to-wit, the 2nd day of June, A. D. 1922, in so far only as it denied, in effect, to the State of West Virginia the right to levy and collect, and restrained these petitioners and plaintiffs in error as the agents and representatives of the said State of West Virginia, from levying and collecting one-third of one cent for each thousand cubic feet of 11,358,837 M cubic feet of natural gas transported in intrastate commerce, within the State of West Virginia, should be set aside, reversed and annulled, and that such further proceedings in said cause shall be had as to justice shall

appertain. E. T. England, Attorney General of West Virginia; S. B. Avis, William Gordon Mathews, Fred. O. Blue, Attorneys for Petitioners and Plaintiffs in Error. Charleston, West Virginia.

12½ [Title omitted.]

[File endorsement omitted.]

13 **BOND ON WRIT OF ERROR.**

Know all men by these presents, that we, Walter S. Hallanan, a responsible person, and as principal for Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, and American Surety Company of New York, a corporation under the laws of the State of New York, as surety, are held and firmly bound unto the United Fuel Gas Company, a corporation under the laws of the State of West Virginia, in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the said United Fuel Gas Company, as aforesaid, its certain successors, attorneys, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 28th day of August, in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a Term of the Supreme Court of Appeals of the State of West Virginia, that being the highest Court of said State, in a suit depending in said court, between United Fuel Gas Company, a corporation, of West Virginia, and Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, a decree was rendered against the said Walter S. Hallanan, State Tax Commissioner of the State of West Virginia and the said E. T. England, Attorney General of the State of West Virginia, and the said Walter S. Hallanan, State Tax Commissioner of West Virginia and E. T. England, Attorney General of the State of West Virginia, having sued out a writ of error from the United States Supreme Court, to the said Supreme Court of Appeals of West Virginia, and having obtained such writ and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said United Fuel Gas Company, as aforesaid, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Walter S. Hallanan, State Tax Commissioner of the State of
14 West Virginia, and E. T. England, Attorney General of the State of West Virginia, shall present said Writ of Error to effect, and answer all damages and costs if they fail, to make their plea good, then the above obligation to be void; else to remain in full force and virtue. Walter S. Hallanan. (Seal.) American Surety Company of New York, by American Surety Company of New York, by Julian C. Byrd, Resident Vice President. Attest: J.

Hunter McClintic, Resident Asst. Secretary. (Seal.) Signed and sealed in the presence of Uriel McCoy. E. L. Burdette.

STATE OF WEST VIRGINIA,
County of Kanawha, To wit:

I, Inez L. Duffield, a Notary Public in and for said County and State do certify that Walter S. Hallanan, whose name is signed to the above bond, this day personally appeared before me in my said county and duly acknowledged the same.

Given under my hand and official seal this 28th day of August, 1922. Inez L. Duffield, Notary Public in and for Kanawha County, West Virginia. (Seal.) My commission expires on the 3rd day of May, 1932.

15 **EXTRACT FROM THE RECORD BOOK OF THE EXECUTIVE COMMITTEE OF THE AMERICAN SURETY COMPANY OF NEW YORK.**

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 31st day of May, 1922.

* * * * * * *

"The following resolution was adopted:

"Resolved, That Julian C. Byrd, of Charleston, West Virginia, be and he is hereby constituted and appointed a Resident Vice President of this Company at the town or city aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company, in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of a Resident Assistant Secretary of this Company."

STATE OF NEW YORK,
County of New York, ss:

I, F. H. Ivers, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 1st day of June, 1922. F. H. Ivers, Assistant Secretary. Seal of the American Surety Company, New York.

16 **AUTHORITY OF SIGNERS FOR SURETY.**

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 18, 1921, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees, American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company, at their meeting held Tuesday, November 30, 1920, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report, as follows:

"We nominate for—

Place.	Resident vice presidents.	Resident assistant secretaries.
Charleston, W. Va.	R. P. De Van.	George W. McClintic.
	G. C. Dick.	W. G. Mathews.
		John E. Campbell.
		J. Hunter McClintic.

Documentary 25¢ Stamp.

* * * * * * *

"Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done; and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by a Resident Assistant Secretary."

ATE OF NEW YORK,
County of New York, ss:

I, H. E. Ising, Assistant Secretary of the American Surety Com-
ny of New York, do hereby certify that I have compared the fore-
ng extracts and transcripts, from the Record Book of the Board of
ustees of the American Surety Company of New York, with the
ginal record of said Board, and that the same are correct extracts
d transcripts therefrom as they appear of record and are set forth
d contained in said Record Book; and I further certify that I have
mpared the foregoing resolutions with the originals thereof, as
corded in the Minute Book of said Company, and do certify that
e same is a correct and true transcript therefrom, and of the whole
said original resolutions; and that the said resolutions have not
en revoked or rescinded.
Given under my hand and the seal of the Company, at the City
New York, this 19th day of January, 1921. H. E. Ising, Assistant
cretary. [Seal of the American Surety Company of New York.]

STATE OF WEST VIRGINIA,
County of Kanawha, To wit:

On this 28th day of August, A. D. 1922, before me personally
me Julian C. Byrd, resident Vice-President of the American Surety
mpany of New York, and J. Hunter McClintic, resident Assistant
cretary of said Company, with both of whom I am personally
quainted, who being by me severally duly sworn, said that they
ided in the city of Charleston, county of Kanawha, State of West
rginia; that they, the said Julian C. Byrd and J. Hunter Mc-
ntic were respectively the resident Vice-President and the resident
sistant Secretary of said American Surety Company of New York,
e corporation described in and which executed the foregoing Power
Attorney and bond; that they each knew the seal of said corpora-
n; that the seal affixed to said Power of Attorney and bond was
ch corporate seal; that it was so affixed by order of the Board of
ustees of said corporation; and that they executed said bond for
d on behalf of said corporation and signed their names thereto by
e order as the resident Vice-President and resident Assistant Secre-
y, respectively, of the Company.
My commission expires on the 3rd day of May, A. D. 1932.
ez L. Duffield, Notary Public in and for said County of Kanawha.
eal.] [Seal.]

ATE OF WEST VIRGINIA,
County of Kanawha, ss:

I, R. N. Moulton, Clerk of the County Court of said Kanawha
unty, which court is a court of record, and has a seal, do hereby
certify that Inez L. Duffield before whom the annexed affi-
davits were made, and who has hereto subscribed her name,
was at the time of so doing a Notary Public of the State of
est Virginia, in and for the said county of Kanawha, duly com-

missioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the hand writing of said Notary and verily believe the signature to be her genuine signature

In testimony whereof, I hereunto set my hand and affix the seal of the County Court of Kanawha County, this 28th day of August, 1922. R. N. Moulton, Clerk of the County Court of Kanawha County, West Virginia. [Seal.]

Approved: Not to operate as a supersedeas.

Dated, August 28, 1922. William R. Day, Associate Justice of the Supreme Court of the United States.

A True Copy:

Attest: Wm. B. Mathews, Clerk Supreme Court of Appeals of West Virginia.

19 **WRIT OF ERROR.**

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between United Fuel Gas Company, plaintiff and Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties,
20 or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said defendants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the thirtieth day of August, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Sansbury, Clerk of the Supreme Court of the United States.

Allowed by —— ——, Associate Justice of the Supreme Court of the United States.

21 **CITATION AND SERVICE.**

In the Supreme Court of Appeals of the State of West Virginia.

In Equity.

UNITED FUEL GAS COMPANY, Plaintiff Below, Defendant in Error,

vs.

WALTER S. HALLANAN, State Tax Commissioner, and E. T. England, Attorney General of the State of West Virginia, Defendants Below, Plaintiffs in Error.

UNITED STATES OF AMERICA, *ss:*

To United Fuel Gas Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of The United States, to be held at the City of Washington in the District of Columbia on the 27th day of September, A. D. 1922, pursuant to a writ of error, filed in the Clerk's office of the The Supreme Court of Appeals of the State of West Virginia, to a final judgment of the said Supreme Court of Appeals of the State of West Virginia, made and entered on the second day of June, A. D. 1922, wherein you were plaintiff below and are now defendant in error and Walter S. Hallanan, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia, were defendants below and are now plaintiffs in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this twenty eighth day of August in the year of our Lord one thousand nine hundred and twenty-two. William R. Day, Associate Justice of the Supreme Court of the United States.

22 Service of the within process acknowledged on behalf of the within named United Fuel Gas Company a corporation, this the 2nd day of September, 1922. United Fuel Gas Company, by R. U. Altizer, Acting Attorney in Fact.

23 **CLERK'S CERTIFICATE.**

STATE OF WEST VIRGINIA:

In obedience to the commands of the within writ, I, Wm. B. Mathews, Clerk of the Supreme Court of Appeals of West Virginia, herewith transmit to the Supreme Court of the United States a true and complete transcript of the record in the cause of United Fuel Gas Company against Walter S. Hallanan, State Tax Commissioner, and E. T. England, Attorney General, of the State of West Virginia, as the same appears upon the records of my said office, together with all things concerning the same, which transcript is comprised of pages numbered from 1 to 23, and that no opinion was filed in connection with the foregoing orders.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court this 11th day of September, 1922, and in the 60th year of the State. Wm. B. Mathews, Clerk Supreme Court of Appeals. [Seal of the Supreme Court of Appeals, West Virginia.]

Endorsed on cover: File No. 29,436. West Virginia Supreme Court of Appeals. Term No. 886. Walter S. Hallanan, State tax commissioner, and E. T. England, attorney general of the State of West Virginia, plaintiffs in error, vs. United Fuel Gas Company. Filed March 2d, 1922. File No. 29,436.

Office Supreme Court, U. S.
FILED
MAR 12 1923
WM. R. STANSBURY

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 886

WALTER S. HALLANAN, *State Tax Commissioner of the State of West Virginia*, and E. T. ENGLAND, *Attorney General of the State of West Virginia*, PLAINTIFFS IN ERROR AND PETITIONERS,

vs) *On Writ of Error and Application for Writ of Cartiorari.*

UNITED FUEL GAS COMPANY, *a corporation*, DEFENDANT IN ERROR AND RESPONDENT.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR UPON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM THE DECREE OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ENTERED UPON THE MANDATE OF THIS COURT UPON FORMER WRIT OF ERROR.

E. T. ENGLAND, *Attorney General of West Virginia*,
S. B. AVIS,
FRED O. BLUE,
WM. GORDON MATHEWS,
Attorneys for Plaintiffs in Error and Petitioners for certiorari.

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Supreme Court of the United States

OCTOBER TERM, 1922.

~~886~~

No. ~~570~~.

WALTER S. HALLANAN, *State Tax Commissioner of the State of West Virginia,* and E. T. ENGLAND, *Attorney General of the State of West Virginia,* PLAINTIFFS IN ERROR AND PETITIONERS,

vs) *On Writ of Error and Application for Writ of Cartiorari.*

UNITED FUEL GAS COMPANY, *a corporation,* DEFENDANT IN ERROR AND RESPONDENT.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR UPON MOTION OF DEFENDANT IN ERROR TO DISMISS OR AFFIRM THE DECREE OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA ENTERED UPON THE MANDATE OF THIS COURT UPON FORMER WRIT OF ERROR.

STATEMENT OF THE CASE.

This suit, the campanion suit of Eureka Pipe Line Company against Hallanan, State Tax Commissioner, and others, and a large number of other suits of corporations engaged in the transportation of oil and gas within the State of West Virginia, were instituted in the Circuit Court of Kanawha County,

to enjoin enforcement by the State authorities of Chapter 5 of the Acts of the Legislature of West Virginia, Extraordinary Session, 1919.

This statute imposed a privilege tax upon persons and corporations engaged in the transportation of oil and gas by means of pipe lines.

This case was submitted to said Circuit Court for final decision upon bill and answer, without replication, and upon an agreed stipulation of facts, and at the same time the case of Eureka Pipe Line Company against the same defendant was submitted for final decision upon bill, answer, replication, and very voluminous depositions.

The Kanawha Circuit Court rendered a final decree in this case, and also in the Eureka case, adjudging said statute to be void as against the respective plaintiffs, and perpetually enjoined the defendants from its enforcement. Appeals were prosecuted from such decree to the Supreme Court of Appeals of West Virginia, where the two cases were argued and submitted and heard together, that Court rendering but one opinion in the two cases.

Said Supreme Court of Appeals of West Virginia reversed the decrees of the Circuit Court of Kanawha County, held the statute in question to be valid, construed said statute and the legislative intent thereof as being to impose a tax upon those engaged in the transportation of oil and gas within said State in intra-state commerce only, measured by the amount of such local commerce, dissolved the injunction of the Circuit Court in so far as the same enjoined enforcement of said act as applied to intra-state commerce as defined by the written opinion of the Court, and in other respects affirmed the said decree, and awarded costs against the plaintiff, United Fuel Gas Company. This case and the opinion and syllabus of the Supreme Court of Appeals of West Virginia is reported in 87 W. Va. 396.

In this case, and in the Eureka case, the plaintiffs sued out writs of error to this Court, and the cases were here fully argued and heard on the same day, considered by this Court upon the merits, resulting in a reversal of the Supreme Court of Appeals of West Virginia, with costs, and a mandate directing "that this cause be, and the same is hereby remanded to the said Supreme Court of Appeals for further proceedings not inconsistent with the opinion of this Court."

These cases were decided by this Court on the same day, the opinion of the majority being delivered in each case by Mr. Justice Holmes, and the opinion in this case being, upon its face, supplemental to, and to be read in connection with the opinion in the Eureka case.

Upon remand to the Supreme Court of Appeals of West Virginia the mandate of this Court was entered of record May 30, 1922, and on June 2, 1922, that Court entered an order which, without showing any motion to have been made or further argument or hearing of any kind, is as follows:

> "The Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars' damages and its costs about its defense in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County."

Believing that the above quoted judgment of the Supreme Court of Appeals of West Virginia wholly failed to carry out the true meaning and intent of the mandate of this Court, and that such final judgment was and is "inconsistent with the opinion of this Court" and was not and is not "in conformity

with the judgment and the decree of this Court," and accordingly that such final order denied the validity of an authority claimed and exercised under the United States, the plaintiffs applied for and obtained from one of the Justices of this Court writs of error in both cases, and also, as matter of precaution, applied for a writ of certiorari in each case, which application is pending.

The United Fuel Gas Company having given notice of its intention to move to dismiss the writ of error issued herein, or to affirm the decree of the Supreme Court of Appeals of West Virginia of June 2, 1922, and to deny the application for a writ of certiorari heretofore made, this cause now comes on to be heard on such motions and the brief of counsel filed therewith.

CORRECTION OF THE STATEMENT OF THE CASE AS CONTAINED IN BRIEF OF DEFENDANT IN ERROR.

(*a*) It is stated, directly and indirectly, throughout the brief of counsel, that prior to the first writ of error allowed the Supreme Court of Appeals of West Virginia had "adjudged the *statute* to be *invalid* in part". (Brief, page 9.) It further appears from such brief of counsel that said Court had held that there was a valid portion of the statute as enacted and that there was an invalid portion of the statute as enacted, but that the State Court held such portions to be severable, and that the valid portion could be maintained and enforced, and that it was the legislative intent that such valid portion should be so maintained and enforced.

This is a curious and palpable misconception of the actual holding by the Supreme Court of Appeals of West Virginia. Instead of holding that the statute was valid in part and void in part, but capable of being separated, that Court held, in language too clear for us to further clarify, that the act in question was valid, and that it was the legislative intent, as well

as the legal effect of the statute, that it should apply, and be restricted in its application, to the local commerce from the plaintiff. Inasmuch as the decision of the State Court is important in this particular, for upon it depends most of the argument of counsel in brief as to the question of severability being a question for state law, and inasmuch as there can be no doubt as to what that Court actually held and decided in this connection, we call the attention of the Court to the clear language of Judge Ritz in the opinion, 87 W. Va., at pages 404 and 405, and to the following language which constitutes Point 8 of the syllabus:

> "Licenses—Tax on Privilege of Transporting Oil and Gas by Pipe Lines over a Certain Length of System Held Valid:
>
> Chapter five of the Acts of the Legislature, Extraordinary Session 1919, imposing a tax upon the privilege of engaging in the business of transporting oil and gas by pipe lines over ten miles in length, properly construed, does not violate any of the provisions of the constitution of the United States or the constitution of this State, *and is a valid and binding legislative act*".

The Court having made it clear that the legislative intent, as shown by the language used, was to restrict the application of the statute to local commerce, and that, as so intended and construed, the statute as a whole was valid, there of course was and is no question of its severability to be considered,and there was no such question when the case was before this Court on the first writ of error.

(*b*) Still more important is the erroneous statement in the brief in this case (p. 12) that the State Supreme Court held that the act, as construed by it, "*was held to apply to all the gas produced in West Virginia by the defendant in error and delivered to other companies for transportation by the latter outside the State*".

A similar statement is made in the brief by counsel in the

Eureka case (p. 12) where it is stated, even more broadly, that the act, as construed by the Supreme Court of Appeals, "*was held to apply to all the oil produced in West Virginia*".

Production of oil or gas in West Virginia was not by the State Court, made a criterion or test of taxability. The Somerset-Cabell oil, partly produced in Cabell County, West Virginia, was expressly held not subject to the tax for, as handled by the Eureka Pipe Line Company, such handling was held to be interstate commerce.

As to the gas the large quantities sold to the Ohio Fuel Supply Company in West Virginia, and by it transported to and used in Ohio, was expressly held *not* subject to the tax.

What the State Court actually held was that the oil and gas produced in West Virginia and not committed or until committed to interstate commerce was subject to the tax. Such principle was in no wise disturbed by this Court, although it held that a certain portion of such oil and gas was committed to interestate commerce when it was sold and delivered to other companies for the purpose of transportation and use beyond the State and it was actually so transported and so sold.

The importance of this distinction is obvious, for upon it is based the entire argument of the defendants in error as to severability of the statute being a question for the State Court after the decision of this Court.

GROUNDS RELIED UPON FOR REVERSAL.

The contentions of the plaintiffs in error relied upon to sustain the writ of error and to justify the reversal of the court below are as follows:

First, that it is manifest from the opinion of this Court upon the first writs of error that it considered these cases upon the merits, and as involving a statute adjudged valid, and that its consideration of the case upon the merits was simply to determine whether a certain class of business shown by the record,

as conducted during a particular year, came within or without the application of the statute. It therefore follows that no order entered by the Court below on remand and upon the mandate of this Court which adjudges that statute, and every part thereof, to be void, can be other than "inconsistent with the opinion of this Court."

Second, that said judgment of the court below if and to the extent that it is "inconsistent with the opinion of this Court" necessarily fails to give effect to the spirit and legal intention of the judgment and mandate of this Court, and that its action in so doing will be corrected by this Court upon second writ of error.

Third, that the action of the court below in holding such statute void in its entirety, after it had been passed upon and treated as valid by this Court and applicable to all local commerce carried on by the plaintiff below, United Fuel Gas Company, was not mere judicial error of the State Court resting upon its construction of State law as to the severability of the statute in question, which could not be reversed by this Court, but was a plain error on the part of said Court in an attempt to execute and carry out the mandate of this Court, and is such an error as this Court can and will correct upon the second writ of error.

ARGUMENT.

Plaintiffs in Error's First Ground for Reversal:

It is manifest from the opinions of this Court that it decided or assumed as a necessary basis for its decision, opinion, and reasoning that the West Virginia statute was valid and applicable as a valid statute to all local commerce of the United Fuel Gas Company, and persons, firms and corporations engaged in similar business.

That the above statement is correct, and that the actual decision of this Court, or at least the necessary structure upon

which the whole of the reasoning rested, was that the statute in question was a valid statute, we believe to be made so clearly apparent as to be indisputable, but, if disputed, to be a matter of absolute demonstration.

We make this statement believing it to be justified by (*a*) the failure of this Court anywhere to say, or intimate, that the statute was void; (*b*) by unmistakable language in the majority opinion stating its validity and the right to collect the tax thereunder to be conceded; (*c*) by the language of the opinion to the effect that the taxability under the statute of a portion of the gas did not change the character of the major transportation; (*d*) the language in the opinion of the dissenting Justices shows that they considered the majority opinion as assuming the validity of the tax; (*e*) because the validity of the tax as to local commerce was expressly conceded in counsel's brief; (*f*) was also conceded at bar in the oral argument; and finally (*g*) because as matter of established law, under prior decisions of this Court, the validity of the statute and of the tax imposed thereby upon the privilege of doing local commerce is too firmly established to be questioned, and was not questioned by court or counsel.

These in their order:

(*a*) Because in neither opinion of Mr. Justice Holmes is it said that the statute, or any part thereof, was void or invalid. It is difficult to conceive the possibility of this Court writing two opinions relating solely to the same *void* statute, the sole subject of its inquiry, and yet refraining from the use of the words "void," "invalid," or any word of similar import. It is equally impossible to believe that if the statute was by this Court deemed as void such vital question would have been left open to conjecture or discussion in further proceedings thereafter necessarily to be taken. Four words, of one syllable each, would certainly have been somewhere used in one or the other of the Court's opinions.

Indeed, with profound respect, we submit that it was idle for this Court in two learned opinions to differentiate between the interstate and intra-state business of the United Fuel Gas Company unless a valid statute was applicable to the latter, and it is impossible for us to conceive this Court as so doing.

(*b*) Because in the opinion of this Court in the Eureka case, at the very outset, the *validity* of the statute was conceded and assumed as the basis for all that followed where, in the opinion, Justice Holmes stated:

> "It is *admitted* that *the tax* may be levied in respect of the last item (i. e. 1,239,099.55 barrels of Pennsylvania grade oil used in West Virginia but the question before us is whether *the tax* can be laid upon the whole product of the State upon which was imposed the gathering charge.")

It is perfectly obvious that "the tax" could not be imposed upon any part of oil or gas transported by the plaintiff companies except under a valid statute, not a void statute, and there was no statute, valid or void, purporting to impose any such tax except Chapter 5, Acts 1919, Extraordinary session.

Hence when "it is admitted" that "*the* tax" "may be levied" in respect to part of the oil or gas transported, the *validity* of the statute upon its face ceased to be a question for this Court's consideration, and the Court simply so treated it, conceding its *validity*, and in the remainder of its opinion in the Eureka case, and in the whole of its opinion in this case, considered only the question as to what part of the oil and gas transported was *subject to the statute*, local commerce being so subject and interstate commerce being wholly beyond its scope and beyond the legislative intent to reach.

(*c*) Because this Court, in this case, assuming the validity of the statute plainly says:

> "That the necessities of business require a much

> smaller amount destined to points within the State to be carried undistinguished in the same pipe lines does not offset the character of the major transportation."

This obviously can mean only that the right to levy the tax upon the oil and gas *used in the State* being admitted, yet the fact that such minor portion so used in the State and subject to the tax was carried undistinguished in the same pipe lines until so used did not affect the character of the residue and *major* portion, so carried in the same pipe lines beyond the State, or render such major portion subject to the tax.

(*d*) It is equally apparent from the dissenting opinion of Mr. Justice Clarke, with whom concurred Mr. Justice Pitney and Mr. Justice Brandeis, that the dissenting Justices, and presumably the Court in conference, conceded the *validity* of the statute then before it, and considered only the question as to how much gas and oil was subject to its terms and the tax imposed thereby.

Mr. Justice Clarke, at the outset of his opinion, says:

> "*There is no controversy* as to the oil from other States or as to the State produced oil that was delivered to refineries in the State, but to the holding of the Court that the State produced oil, which ultimately went out of the State, moved in interstate commerce from the time it left the wells, I can not agree."

Assuming the validity of the statute from this point in his opinion Mr. Justice Clarke discusses only the question whether certain oil held by the majority to be moving in interstate commerce, and hence not subject to the statute, was not in fact and law moving in local commerce and hence subject to the statute and tax. He concludes:

> "Believing as I do that this transportation of oil over approximately four thousand miles of 'gathering' lines in the State to the trunk lines was a local shipment, as the parties all declared it to be, I think the State

should be permitted to impose a reasonable license or acceptation tax upon the company engaged in such extensive State activity, measured by the volume of such traffic, and that the judgment of the Supreme Court of Appeals of West Virginia restraining the statute to this scope should be affirmed."

It is clear upon the face of the dissenting opinion of the three dissenting Judges that such dissent was solely because the majority opinion excluded from the *operation and proper scope* of the statute certain oil and gas held by the majority to have been moving in interstate and not local commerce.

It is obvious that there could have been no dissent, on this ground, had the *statute itself* been deemed or considered as void by either the majority or the dissenting Justices.

(*c*) Because the validity of the statute in question (subject to one ground of attack hereinafter noted) was a deliberate concession of counsel, carefully stated in brief, on the first writ of error.

In the able and elaborate principal brief filed on behalf of the plaintiffs in error in the Eureka case, signed by Messrs. James M. Beck and Frank L. Crawford, page 50, Point VIII, the contention of the plaintiff in error was summarized, capitalized and stated, and the judgment of this Court asked, as follows, the italics being ours:

"Point VIII."

"The decree of the Supreme Court of Appeals, in so far only as it modified the decree of the Circuit Court of Kanawha County, and *except as to Pennsylvania grade oil produced in West Virginia, gathered by plaintiff in error, transported in the stream of oil and divided en route to refineries within the State,* should be reversed, and in all other respects should be affirmed; and the said decree of said Circuit Court *should be modified by excepting therefrom only the oil so diverted as aforesaid,* and *as so modified* should be affirmed.

(*f*) Because the validity of the statute and the right there under to collect the tax imposed upon oil transported and consumed wholly within the State was expressly conceded at the commencement of the oral argument in this Court by the senior counsel for the plaintiff in error in the Eureka case, Mr. Crawford, in response to a direct question propounded by Mr. Justice Holmes, which the Court may, and counsel will, recall.

The effect of such a concession by counsel was very recently adverted to by this Court. *Hill* v. *Smith,* decided January 15, 1923.

(*g*) Because as matter of established law, and regardless of the proper concessions made by counsel, this Court could not have held the statute in question, as construed by the Court below and limited in its application to gas moving in local commerce, both as to application and measure of the tax, to be void as a statute for infringing on interstate commerce. And the fact that the plaintiff in error used the same instrumentalities for carrying on an interstate business, not subject to the statute, in no manner whatever could affect the right of the State of West Virginia to impose a privilege tax on its right to carry on a local business or affect the *validity* of the statute doing so.

Osborne v. *Florida,* 164 U. S. 650;
Bowman v. Oil Company, 256 U. S. 642.

Certainly no such suggestion of error, going to the *validity* of the statute, was urged upon or even suggested to this Court by counsel after the statute was construed as it was by the Court below.

It is true that there was an additional assignment of error in this case not presented in the Eureka case. This we referred to above, and it was, in effect, that the statute was void as to this plaintiff under the Fourteenth Amendment and the

due process clause, because it did not in terms prescribe a uniform pressure for gas measurements. As to this assignment of error we deem it sufficient to say that it is neither stated nor discussed in either of this Court's opinions, and it can certainly not be that this Court deemed or held the statute void as a whole or subject to further question for such reason.

For the foregoing reasons we think it too plain for argument that under the letter and the plain spirit of the opinions and decision of this Court upon the first writ of error this Court either decided, or necessarily assumed as a basis for its decision, the validity of the statute in question. If so, such decision could never be re-opened by the court below, and could never be re-opened even by this Court after the end of the term. It is the law of the case, certainly as between the parties litigant.

To permit the State Court on remand to re-open and reverse this basic principle, whether actually decided or necessarily assumed by this Court as a basis for its legal decision, would be to permit the State Court, in substance and effect, to hold the reverse of the judgment of this Court. To permit it to decide the statute to be valid between the parties on the first writ of error, and to require this Court upon such writ of error to consider the merits of the case as disclosed and arising under such valid statute, then for the State Court thereafter to change its mind, especially for reasons which were at all times in the record before it, is to trifle with this Court and to render its investigations academic and its decisions moot.

It is idle to say that simply because this Court reversed the decree of the State Court as a whole such reversal permitted, much less required, the State Court to re-open all questions of validity of the statute, which questions were plainly assumed as having been finally decided by this Court, and made the very basis for its whole opinion.

Plaintiffs In Error's Second Ground For Reversal:

The final judgment of the State Supreme Court, now holding the statute to be void in its entirety, is plainly "inconsistent with the opinion of this Court," violates the law of the case, fails to give effect to the spirit and legal intention of the judgment and mandate of this Court, and its action in so doing is proper to be corrected by this Court on second writ of error.

Whatever was necessarily embraced in, or essential to, the decision and opinion of this Court on the former writ of error is conclusively deemed to have been held and decided by this Court. It becomes the law of the case, no longer open in any court. The rights of the plaintiff in error thereunder are derived, held and exercised under an authority of the United States, and any decision adverse to such rights is a decision against their validity, proper to be corrected on writ of error. The power and duty of this Court to see that the decisions and mandates are properly, and not arbitrarily, construed, and are carried into effect by State Court is an inherent power of the highest and most essential nature. The proper method of such procedure to enforce such power may have been, at one time, not free from doubt, but that such power exists and would be enforced whenever and in whatsoever manner might be deemed most appropriate in a given case has not been an open question since the decision in *Martin* v. *Hunter*, in 1816.

Proper control and execution of the mandates of this Court, when not accorded by inferior courts, has been applied for through the aid of various auxiliary writs, such as certiorari, manadamus and writs of error, and this Court has never experienced difficulty in compelling the enforcement of such mandates in accordance with their true spirit and legal intent. It has gone so far where deemed expedient as to recall its mandate and enter final judgment upon a mere petition, accompanied by a transcript, filed by the plaintiff in error in this Court ask-

ing "that the court take proceedings to render its judgment effectual." *Williams* v. *Bruffy*, 102, U. S. 248; 26 L. Edition 135. But it is considered now to be the well settled law and procedure that the proper method to enforce execution of a mandate of this Court to a State Court is by second writ of error, and not by a mere summary or coercive process. At least where the action of the State Court is based upon a judicial misconception of the effect of the mandate of this Court, and not upon arbitrary disregard thereof.

In re Blake, 175 U. S. 115; 44 L. Edition 94;
Mutual Life Insurance Co. v. McGrew, 188 U. S. 291;
Crescent City Live Stock etc. Co. v. *Butchers Union*, 120, U. S. 147; 30 L. Edition 614;
Central National Bank v. Stevens, 169 U. S. 432; 42 L. Edition 807;
Magwire v. Tyler, 17 Wall. 253; 21 L. Edition 576;
Stanley v. Schwalby, 162 U. S. 282; 4 L. Edition 970;
Taylor on Jurisdiction and Procedure of U. S. Supreme Court, 457 *and following.*

Indeed the principal case relied upon in support of the motion to dismiss in the case at bar, *Schneider Granite Co.* v. *Gast Realty etc. Co.*, 245 U. S. 288; 62 L. Edition 292, strongly supports the propriety of a writ of error in this case.

There the State Court took precisely the corresponding and appropriate action to that which we understand the State Court should have taken here, namely, recognized the statute as valid except in so far and to the extent that the decision of this Court showed it to be invalid, and the Missouri State Court having taken this view, and both parties having prosecuted writs of error to this Court such writs of error were sustained, and the judgment of the State Court was affirmed.

As we have suggested, and will point out under the next heading, the case at bar is unlike the Missouri case and others relied

upon by counsel, in that it presents no question of the severability of a void portion of a statute from the valid residue, or the determination after such severance as to the validity of the residue of the statute, or whether the Legislature would have enacted such residue only if it had known that a portion of the statute, as actually enacted, was valid.

We have carefully examined the decisions of this Court cited by counsel for appellee bearing upon the propriety of the writ of error, and, with deference and respect, we submit that they are wholly without application. The cases cited of *Reinman* v. *Little Rock*, 237 U. S. 171; 59 L. Edition 900; *Rogers* v. *The S. B. Wheeler*, 20 Wall. 385; 22 L. Edition 385; *Baer Irrigation Company* v. *Garland*, 164 U. S. 1; 41 L. Edition 327, and other cases cited, simply announce a recognized and undisputed rule that where the decision of the lower court was based upon conflicting evidence as to facts, or dependent upon doubtful inferences, especially where two or more courts had already decided such facts against the plaintiff in error, that this Court would presume the correctness of such findings. No one questions the correctness of this principle. To illustrate, in the case of *Rogers* v. *Wheeler*, relied on, this Court said:

> "Questions of fact only are presented by this appeal. There is no dispute as to the law. Two Courts have already found against the appellants. It has been over and over again ruled by this Court that under such circumstances the burden is on the appellants to show the error."

Again, in the case of *Reinman* v. *Little Rock, supra*, Mr. Justice Pitney used this language:

> "Hence in the present case we ought to, and do assume that the Arkansas Supreme Court acted upon the basis of the *facts* set up in the answer of the City, treating them as sufficiently substantiated by the effect of the demurrer in admitting them to be true so far as properly pleaded."

That case simply presented a question as to whether facts averred in the answer, to which there was a demurrer, were, under the State practice, taken as true, and this Court held that they were so taken as true, and being true, justified the decree of the State Court.

The case of *Comanche Light & Power Co.* v. *Nix*, 53. 220, is also cited. There the State Court upon remand from this Court held that a State statute imposing a gross revenue tax based upon total gross receipts, from interstate as well as local commerce, was void in its entirety. This was in strict accordance with the decision and opinion of this Court, as to the same act theretofore held invalid in *Meyers* v. *Wells Fargo Co.* 223 U. S. 298; 56 L. Ed. 445, which affirmed a decree of the lower Federal Court holding the act invalid as a whole, as Mr. Justice Holmes in the opinion, which affirmed the State Court enjoining the collection of the tax, and while saying that whether that particular statute was severable was a question ultimately for the State Court, yet had said:

> "*But we see no possible construction* on which it could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. For, to recur to the statute, it is not simply a tax on all gross receipts within the state, which possibly might be read as intended to reach such receipts as it could, even if less than all (*Ratterman v. Western U. Telegraph Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep, 59, Sup. Ct. Rep. 1127); it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the state has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

This language had clearly indicated that the basis of this Court's reasoning in that case was upon the theory that the whole statute was void, just as the opinion in the case at bar in-

dicates that this Court deemed and treated the whole statute as valid, as had the West Virginia Court.

Plaintiffs in Error's Third Ground for Reversal:

The action of the State Court upon remand from this Court adjudging the statute in question void was a misconception of and error in executing the mandate of this Court, and was not merely a matter for State decision and involving no Federal question.

In support of this proposition we submit that the record and final order of the State Court on its face shows that it was entered upon exactly and precisely the same record before that Court when its first decision was made, that no new pleadings or evidence of any kind was before that Court, that its action was its own action taken solely upon the mandate of this Court and does not show that there was any re-opening of the case, re-argument, additional briefs or any motion of any kind on behalf of either litigant.

It is also earnestly contended that the failure of the State Supreme Court of Appeals to write an additional opinion or assign any reason for its final action, which was diametrically opposed to its former action and in conflict with the reasons and opinions assigned therefor, conclusively shows that the action of that Court was not and was not intended to be its own independent judicial action, because, if it had been, the Constitution of West Virginia requires that Court to give its reasons for such action in writing, and prepare a syllabus of the points by it decided.

The record shows that the mandate of this Court was recorded May 30, 1922, and that the State Court "takes time to consider of the final order to be entered in this cause." It was not placed

upon the docket, no re-argument was ordered and, of course, no additional evidence or pleading was received or offered.

The record shows that on June 2, 1922, that "*the Court, having maturely considered the mandate of the Supreme Court of the United States filed and entered of record in this case, and the record of the decree aforesaid, is of opinion that there is no error in said decree.* It is *therefore* adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County pronounced in this cause on the 14th day of September, 1920, be and the same is hereby affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended; all of which is ordered to be certified to the Circuit Court of Kanawha County."

This is the record and the action in the State Court upon remand, and the whole of it. We submit that upon its face it shows that that Court did not, on its own motion or because of its own judgment, change or recede from a single point theretofore decided by it, or a single reason theretofore assigned for its decision, but simply from a mature consideration of the mandate of this Court, and considering that it required such action it "*therefore* adjudged, ordered and decreed" affirmance of the decree of the Circuit Court of Kanawha County, which held the entire statute void.

We submit that no other fair construction of the action of the court below is deducible from this record. Absolutely nothing was before that court when this final order was entered except the pleadings and facts which were before it when its first order was entered, with the sole exception of the mandate of this Court, which mandate and record shows the State Court had "maturely considered" and upon consideration of such mandate and "*therefore*" it affirmed the decree, which it had formerly reversed and had assigned elaborate and carefully considered reasons for such reversal. This was manifestly an attempt of

the State Court to simply execute the mandate of this Court, and that it deemed a decree holding the statute void to be necessary to such execution of the mandate.

We respectfully submit that the State Court erred in so doing, that it attached undue importance to the phraseology of the mandate which reversed its former decree as a whole, and insufficient importance to the provisions of such mandate and required further proceedings to be in accordance with the spirit and language of the opinion.

We submit that it is a mere quibble to stress the language of the final order that the cause came on upon "the record of the decree aforesaid", for such phraseology is simply the time honored and universal phrase always used by that Court in affirming or reversing action of inferior courts, and it can hardly be assumed that by the use of this steriotyped language it intended thereby to give its approval to the *opinion* of the trial judge, which is bodily embraced in the decree appealed from. The Constitution and laws of West Virginia neither require nor authorize an opinion of a nisi prius judge, and the unusual and irregular embodying thereof by such trial judge in his decree lent no sanctity thereto, and even if the decree had been affirmed in the first instance would not necessarily or at all have meant that it was affirmed because of the *reasons* assigned by the trial judge in a memorandum which he saw fit to embody in a decree. The decree, not the reasons, of a Circuit Judge, is what the appellate court affirmed or reversed.

It is a question of gravest doubt whether the State Court had the *power,* even if it had the inclination, to reconsider or change its former decision, so far as not automatically changed or required to be changed by the decision of this Court. Its former order was final as to it. The term had ended. Virginia and West Virginia decisions are in accord with the decisions of this Court in holding that "no principle is better settled, or of more universal application, than that no court can reverse or annul

its own final decree, for error of fact or law, after the term in which they have been rendered unless for clerical mistakes''. *Magwire v. Tyler,* 17 Wall. 253, 21 L. Ed. 576.

It is hardly to be presumed that it would do so and yet entirely withhold any reason for so doing.

But if there should be any doubt upon the face of the record alone as to whether the Supreme Court of Appeals of West Virginia was itself deciding the case anew and adjudging new and different principles from those formerly decided by it in the same case, or whether it was simply attempting to execute the mandate of this Court, we submit that all doubt upon this point is removed when such action is considered in the light of the duty of the State Court in the decision of causes under the State Constitution.

Article VIII, Clause 5 of the Constitution of West Virginia, in effect since 1872, provides as follows:

> ''When a judgment or decree is reversed or affirmed by the Supreme Court of Appeals, every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing and preserved with the record of the case; and it shall be the duty of the Court to prepare a syllabus of the points adjudicated in each case concurred in by three of the Judges thereof which shall be prefixed to the published report of the case.''

This provision is perfectly plain. It requires the Supreme Court of Appeals when it exercises its own judicial judgment to decide every point fairly arising upon the record and to state concisely the reasons therefor in writing and to preserve such reasons with the record of the case, and further under the specific and wise provision above quoted, that it shall be the duty of the Court to prepare a syllabus of the points adjudicated in each case concurred in by three of the Judges thereof, which shall be prefixed to the published report of the case.

Of course, it will be conceded that this Constitutional provision does not require the State Supreme Court to write an opinion or prepare a syllabus setting forth the reasons assigned and the questions arising and decided by the Supreme Court of the United States on writ of error to it. If therefore the State Court by its final order was, as we understand, simply endeavoring to carry out and execute the mandate of this Court, no reasons, opinions or syllabus would be either proper or necessary.

If, however, the State Court intended, as counsel for the defendants in error are driven to suggest or assume that it did intend, to hold and decide as a matter of independent judgment that the entire statute was void, simply because this Court had held that a portion of the particular business done by a particular company during one year only was not subject to the tax which the State Court had thought it to be subject to, then clearly a typical case would have been presented under the Constitutional provision requiring the Supreme Court of Appeals of West Virginia to state each point it was deciding, assigning its reasons in writing therefor, and prepare the syllabus in compliance with such provision.

This provision has been held in certain cases to be directory, and not to require the State Court to restate over and over again established principles of former decisions, constituting well settled law and filling the reports with useless matter. *Horner* v. *Amick*, 64 W. Va. 172. But it is applicable to all other cases before that Court, and is applied as to all points involving novel questions of law not already settled by its decisions. *Idem*, at page 175.

The purpose of such provision is obvious, namely, that the law of the State shall be definite, published, accessible and known to its citizens. When we consider the fact that in the case at bar the former decision of the State Court, and each point decided has been so published in its official reports in compliance with the Constitution, we submit that it is almost unthinkable that

if the same Court, in the same case and between the same parties, as a matter of its own independent judicial action undertook to reconsider practically every point decided by it theretofore, and to decide the same in a diametrically opposite way, it would have disregarded the Constitutional provision, and carefully and forever concealed from ascertainment the points which it was actually deciding, as well as the reasons therefor.

Counsel for the defendant in error are obliged to take the position that this was precisely what the Supreme Court of Appeals of West Virginia did, and they suggest, in the absence of any reason assigned by that Court for its action, that the Court upon learning that this Court had excluded from the operation of the statute a certain part of the business done by one company, during one year, assumed as matter of law that the Legislature would not have enacted such statute had it known that such excluded business would be held by this Court to be not subject to the tax, and accordingly that the particular company would pay for carrying on business during 1919 somewhat less than it would have done otherwise.

We submit that such assumption is both violent and unsupported in reason. The Court had judicial knowledge of the needs of West Virginia to raise additional revenues, and that a number of new methods of taxation were resorted to for such purpose, among them the act in question. It knew, and expressly held in its former decision, that the Legislature was aware that it could not impose a tax upon interstate commerce, or a tax measured by interstate commerce, and that it attempted to do no such thing. It specifically held that it was the legislative intent to tax only the business of carrying on local commerce, measured by such commerce, and assigned elaborate and unanswerable reasons for so holding. Exactly such a statute, in accordance with such legislative intent, it declared was enacted and upheld. We submit that the validity of such statute was conceded before this Court, and that its opinion, properly construed, sustained

and upheld it. The argument, therefore, is not that a portion of the statute has been declared invalid, and that, therefore, perhaps the State Court might have assumed that the Legislature would not have enacted the residue had it known of the invalidity of a part, but goes much further and assumes that the State Court assumed that the Legislature would not have enacted a perfectly valid statute if it had known that during one year one company would have paid less under the decision of this Court than it would under the decision of the State Court.

With great respect, we submit that such an assumption is utterly untenable, and that this Court will not assume that the State Court would have adopted any such line of reasoning or reached any such conclusion. There is no ground for such belief, except the present suggestion of counsel, and the further suggestion that this untenable argument, which counsel have never advanced in this case in any court, may perhaps have now suggested itself to the Supreme Court of Appeals of West Virginia and carried conviction which resulted in the final action of that Court.

While we do not consider it important, it should be observed, however, that the statute as sustained by the State Court, and as we believe recognized and approved by this Court, was not a failure even from the standpoint of a revenue producing statute as against this one company, United Fuel Gas Company, and for the first year of its operation. The record shows that that company admitted that it did a purely local business, and, therefore, one subject to the tax, if the statute is valid, during 1919 amounting to eleven billion five hundred and ninety million six hundred and fifty-six thousand (11,590,656 M) cubic feet of natural gas transported and sold to consumers in the State of West Virginia. The tax is one-third of one cent per thousand cubic feet of such gas, which would be $38,635.52. In addition, the statute as construed by the State Supreme Court, and as we insist recognized and upheld by this Court, would apply to so much ad-

ditional gas as was produced and transported in West Virginia by the United Fuel Gas Company and by it sold to Columbia Gas & Electric Company, Pittsburgh and West Virginia Gas Company and Hope Natural Gas Company and by these companies sold to consumers in West Virginia, who consumed such gas without it every at any time crossing the State line. The record shows that this additional gas sold to the three named companies during the one year amounted to the enormous amount of twenty-two billion two hundred and ninety-nine million one hundred and fifteen thousand (22, 299,115 M) cubic feet of gas. Of this the record shows that these companies transported and sold in West Virginia, to consumers who consumed the same therein, respectively, 1%, 12% and 33%.

The Court will remember that this tax applied not only to this character of the business done by the plaintiff, United Fuel Gas Company, but also to every other gas company in West Virginia transporting gas by pipe lines over a certain length, and also to the Eureka Pipe Line Company and such business of similar companies transporting oil in West Virginia. It is apparent, therefore, that, if we are correct as to the intention of this Court to treat the statute as valid so far as the local commerce of such companies is concerned, the statute was an effective and large producer of the revenue sorely needed by the State. No company covered by the statute escapes the taxation which it provides by reason of the decision of this Court, and none of the business of any such transportation company which the State had or has the power to tax escapes taxation to the full extent of such power by reason of such decision.

The most that can be said is that the Supreme Court of Appeals of West Virginia was of opinion that during one particular year one particular company was not subject to a tax on a certain part of its business which that Court had held to be local and not interstate. This certainly could not affect the validity of the statute, and equally certain it could not and did not affect

the legislative intent in the enactment of such statute. If the Legislature is to be credited with the knowledge imputed to it by the Supreme Court, that interstate commerce could not be taxed or taken as a measure of taxation, then it would seem that it might be imputed, in law, with knowledge that the business which this Court has held to be interstate was interstate, and to have enacted the statute in the light of such knowledge.

Finally, we submit that the reason now suggested by counsel as being that which might have influenced the State Supreme Court in its final action, namely, that because the statute for one year and as to one company applied to less business than the State Supreme Court thought was covered by the statute, could hardly have controlled its judgment or caused it to reach a conclusion exactly opposed to its former conclusion, because that Court, and this Court, had before it no record justifying it in the assumption that the business held by this Court to be untaxable in any way influenced the Legislature. That Court could not know what was the character, or the extent of the tax business done by the other numerous corporations of West Virginia subject to this tax. It had no method of knowing that the business necessities of this plaintiff, United Fuel Gas Company, in the ensuing year might not become wholly local, with no element of interstate commerce anywhere involved. All it knew or could know was that such business would change and fluctuate. It knew that conditions may well develop resulting in the greater part of all gas transported by the United Fuel Gas Company in West Virginia being consumed in West Virginia, and thus becoming subject to tax. It was and is entirely conceiveable that, in the not distant future, every foot of gas produced in West Virginia will be consumed in that State, and that the business of transporting gas in pipe lines in that State will be purely local as to every foot of gas transported. The increased and increasing demand for fuel gas in West Virginia is too well known to require comment. It has occasioned the enactment of several

State statutes the purpose of which is to require and compel deliveries of gas in West Virginia to meet such needs. Some of these statutes have resulted in litigation now pending in this Court.

Therefore, aside from any question of the amount of the immediate revenues derivable under the act in question, it may certainly be assumed that it was enacted by the Legislature with knowledge and reasonable anticipation of the revenues thereunder steadily increasing in future years.

It is a conservative statement that the statute in question, as construed by the State Court and by this Court, reaches with the power of taxation every person, firm and corporation engaged in this class of business which the State had the power to tax, or which the Legislature considered that it had the power to tax, and reaches every foot of gas subject to taxation or which can be taken as a measurement of taxation.

It must also be borne in mind that the Legislature knew, indeed was keenly aware, that gas as a subject of taxation is elusive and will become exhausted, and that to derive any considerable revenue therefrom it must be taxed as used and before exhaustion.

This being true, we confess that the argument of counsel that the statute has failed to accomplish a large part of the legislative intent and that it will be presumed that the Legislature would not have so enacted it if it had known that interstate commerce was not subject to taxation, or that a part of the business of this company which one court thought was intra-state business is in law interstate business, is difficult to follow. It is still more difficult to believe that this line of argument, which escaped all counsel throughout and the State Court on the first hearing, as well as this Court, suggested itself to the State Court upon remand of the cause thereto with such compelling force as to require it to sweep aside its own adjudication and its own reasons therefor,

and, in effect, all that was done before and by this Court on the first writ of error.

It is still more difficeult to believe that a reason so cogent, and so destructive in its application, should have been scrupulously concealed by the State Court and left to mere conjecture, particularly in the face of the Constitutional provision above quoted.

CONCLUSION.

We submit that the motion to dismiss or affirm should be overruled. And the case having been fully presented on brief, unless the Court desires further argument on the merits, the final order of the Supreme Court of Appeals of West Virginia pronounced on the 2nd day of June, 1922, should now be reversed with costs and the cause remanded with directions to the court below to reverse the decree of the Circuit Court of Kanawha County of September 14, 1920, in so far as the same restrains the defendants from enforcing or attempting to enforce against the plaintiff the provisions of said act in so far as the same applies to and is measured by the intra-state business of said plaintiff, including in said intra-state business such gas as is transported and sold by it to persons and corporations for use and actually used and consumed in West Virginia, and excluding from intra-state business all gas transported by it to points outside of West Virginia or transported and sold in West Virginia to persons and corporations for transportation and use outside of West Virginia and actually so transported and used.

Respectfully submitted,

WALTER S. HALLANAN,
State Tax Commissioner of West Virginia, and
EDWARD T. ENGLAND,
Attorney General of West Virginia.

S. B. Avis
F. O. Blue
Wm. Jordan M

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 570.

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia, and E. T. ENGLAND, Attorney General of the State of West Virginia, *Plaintiffs in Error and Petitioners,*	)	On Writ of Error and Motion for Writ of Certiorari.
vs.	)	
UNITED FUEL GAS COMPANY, a corporation, *Defendant in Error and Respondent,*	)	

NOTICE OF MOTION TO DISMISS OR AFFIRM.

SIRS:

Please take notice that at a session of this Court to be held at the Capitol in Washington, D. C., on the 12th

day of March, 1923, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, we shall move the motion annexed for an order dismissing the writ of error heretofore issued herein, dated August 28, 1922, and directed to the Supreme Court of Appeals of the State of West Virginia, or affirming the decree of said Supreme Court of Appeals entered herein June 2, 1922, and denying the motion for a writ of certiorari made October 2, 1922.

Charleston, W. Va., February 10, 1923.

MALCOLM JACKSON,
R. G. ALTIZER,
Attorneys for United Fuel Gas Company.
Defendant in Error and Respondent.

To:

HON. E. T. ENGLAND,
Attorney General of West Virginia,
S. B AVIS, ESQ.,
WILLIAM G. MATHEWS, ESQ.,
FRED O. BLUE, ESQ.,
Counsel for Plaintiffs in Error and Petitioners.

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vs.	)	
UNITED FUEL GAS COMPANY, a corporation, *Defendant in Error and Respondent.*	)	

MOTION TO DISMISS OR AFFIRM.

Now comes the United Fuel Gas Company, the defendant in error and respondent, by Malcolm Jackson and

R. G. Altizer, its counsel, and moves this Court, under Sections 4 and 5 of Rule VI, to dismiss the writ of error issued herein, dated August 28, 1922, and addressed to the Supreme Court of Appeals of West Virginia, or to affirm the decree of the said Supreme Court of Appeals made herein June 2, 1922, and to deny the motion for a writ of certiorari heretofore made herein by petitioners.

STATEMENT OF THE CASE.

This suit was brought by the defendant in error, United Fuel Gas Company, in the Circuit Court of Kanawha County, West Virginia, against certain officials of that State, to enjoin the enforcement of a statute of that State against the defendant in error, upon the ground, among others, that the said statute was in violation of certain provisions of the Constitution of the United States. The statute is referred to in the record as Chapter 5 of the Acts of the Legislature of West Virginia, Extraordinary Session of 1919, and upon its face purports to levy a tax upon certain privileges, amongst which was that of transportating natural gas, by means of pipe lines, for sale to consumers within or without the State.

The defendant in error was engaged in the transportation of natural gas under varying circumstances, but the business so conducted during the year in question may be classified for present purposes, with respect to its interstate or intrastate character, as follows:

First. 10,200,804 M cubic feet was transported from the points of production in West Virginia and Kentucky, across the boundary line of one or more adjoining States, where it was sold to consumers thereof.

Second. 10,283,019 M cubic feet was transported from the points of production in West Virginia to a point near the boundary line between that State and the State of Ohio, where it was sold and delivered to Ohio Fuel Supply Company, a connecting company, and the entire quantity so delivered to such purchaser further transported by the latter into said State of Ohio.

Third. 22,799,115 M cubic feet was transported from the several points of production in West Virginia to other points in the same State, where it was sold and delivered to three connecting transportation companies, and by the latter the greater part of the gas delivered to each of them respectively was further transported by them into adjoining States, although some part of that delivered to each of said connecting companies was by them resold to consumers of the gas in the State of West Virginia.

Fourth. 11,590,656 M cubic feet was transported from the points of production in West Virginia to other localities in that State, where it was consumed.

The court in which the injunction was originally applied for held that the major part of the transportation above mentioned was interstate commerce; that the tax in question was a burden upon such interstate commerce, and therefore unconstitutional as to such major part; and further, that the invalid part of the statute was not severable from the valid part since, in the opinion of the court, it was not possible to say from the language of the Act that the Legislature would have enacted the valid part standing alone. The said Circuit Court therefore entered its final decree enjoining the plaintiffs in error

from enforcing any part of the Act against the defendant in error.

Upon an appeal from this decree to the Supreme Court of Appeals of West Virginia, the latter court reversed in part, said decree of the Circuit Court, construed the statute as having been intended to apply to the privilege of transporting natural gas in intrastate commerce only, and held that the business of the defendant in error mentioned under First and Second above, being that in which the gas was transported from the points of production into an adjoining State entirely through the pipe lines of the defendant in error, and that in which the gas was delivered by the defendant in error to the Ohio Fuel Supply Company and the whole quantity so delivered transported by the latter into an adjoining State, were transactions in interstate commerce, but that the transportation mentioned as Third and Fourth above, being that where the gas was produced by defendant in error in West Virginia and delivered to other transportation companies within that State for further transportation by the purchasers chiefly, but not entirely, to points outside of the State, and that where the gas was both produced and consumed within the State, were, in each case, intrastate commerce, and that the statute in question created a valid tax upon such parts of the business.

The last mentioned decision was reviewed in this court upon a writ of error obtained by the present defendant in error. *United Fuel Gas Co.* v. *Hallanan*, No. 276, October Term, 1921, decided December 12, 1921. This court reversed the decree of the Supreme Court of Appeals of West Virginia, and decided that the business of the defendant in error, in the transportation and sale of gas to other companies for further continuous transportation

by them to points chiefly outside the State, was transportation in interstate commerce, to which the tax could not be constitutionally applied, and the cause was remanded to the Supreme Court of Appeals of West Virginia, with directions to enter a decree not inconsistent with the opinion of this court.

From the proceedings to this point it will therefore appear that when the mandate of this court was received by the Supreme Court of Appeals of West Virginia, there was left undisposed of the question of whether or not, under the laws of the State, the statute, thus emasculated, was still valid as to the purely intrastate business of the defendant in error, being the part thereof mentioned as Fourth above in which the gas, which was the subject of the transportation, was both produced and consumed in the State of West Virginia, or, in other words, whether the statute was divisible under the State law. This question was, after the receipt of the mandate of this court, decided by the Supreme Court of Appeals of West Virginia, and its final decree, for the review of which the pending writ of error was obtained, is in the following language:

> "UNITED FUEL GAS COMPANY, Plaintiff Below, Appellee,
>
> vs.
>
> WALTER S. HALLANAN, State Tax Commissioner, etc., et al., Defendants Below, Appellants.
>
> Upon an appeal from a decree of the Circuit Court of Kanawha County, pronounced on the 14th day of September, 1920.
>
> The Court, having maturely considered the mandate of the Supreme Court of the United States

filed and entered of record in this cause and the record of the decree aforesaid, is of opinion that there is no error in said decree. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, be and the same hereby is affirmed, and that the appellants do pay to the appellee thirty dollars damages and its costs about its defense in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County."

This decree, it will be observed, simply affirms the decree of the Circuit Court, and the latter was a decree that the statute in question was void in its entirety, for the reason that a part of the tax thereby imposed was in violation of the commerce clause of the Federal Constitution and the valid part was not severable from the invalid part. The Supreme Court of Appeals did not file any further opinion with its said final decree.

ARGUMENT ON BEHALF OF UNITED FUEL GAS COMPANY, DEFENDANT IN ERROR AND RESPONDENT, IN SUPPORT OF MOTION TO DISMISS THE PENDING WRIT OF ERROR OR TO AFFIRM THE FINAL DECREE OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, AND TO DENY THE MOTION FOR A WRIT OF CERTIORARI.

This motion is made under the authority of Sections 4 and 5 of the Sixth Rule of this court, upon the theory that the question upon which the decision of the cause depends is so frivolous as not to need further argument.

As stated above, this is the second writ of error to the Supreme Court of Appeals of West Virginia in this cause, and its prosecution cannot be justified unless it be made to appear that the final decree of the State Court was contrary to the mandate of this court following its decision upon the first writ of error. For convenient reference, the decision of this court and its mandate upon the first writ of error, No. 276, October Term, 1921, will be reproduced as an appendix to this brief.

It is now contended by the defendant in error, in support of its motion to dismiss the pending writ of error or to affirm the final decree of the Supreme Court of Appeals of West Virginia, that said former decision of this court upon the first writ of error herein determined every question of which this court has jurisdiction, and left for decision only the interpretation of an Act of the Legislature of the State of West Virginia under the Constitution of that State, as to whether or not such statute was divisible, it having been adjudged to be invalid in part.

Point I.

THE PRESUMPTION IS THAT THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, IN MAKING THE DECREE NOW UNDER REVIEW, DID SO ON THE GROUND THAT THE LEGISLATURE WOULD NOT HAVE ENACTED THE STATUTE IN QUESTION IF, AFTER SUCH ENACTMENT, IT COULD ONLY BE MADE TO APPLY TO THE GAS BOTH PRODUCED AND CONSUMED WITHIN THE STATE, AND THEREFORE THAT THE STATUTE WAS NOT SEVERABLE.

It appears from the record upon the former writ of error, by the admitted allegations of the bill of complaint, that, at the time of the enactment of said statute by the Legislature of West Virginia, and for a number of years previous thereto, more than one-half of all natural gas produced in the State of West Virginia was being, and had been during each of said years, transported to places outside the State of West Virginia, for sale to consumers thereof in other States, and the statute upon its face provided in clear and explicit terms that the tax should be levied upon the privilege of transporting natural gas "for sale to consumers within or without the State." It further appears from said record that much more than one-half of the business conducted by the defendant in error, in the transportation of natural gas, was of an interstate character, being transportation from the places of production in West Virginia (either directly through pipe lines operated exclusively by the defendant in error or in connection with connecting pipe line companies) to localities in other States, for consump-

tion in such other States. These facts were no doubt taken into account by the Supreme Court of Appeals of West Virginia when it undertook to determine by its final decree whether or not said statute was severable, but the reasons which influenced the Supreme Court of Appeals in reaching its conclusion as to legislative intent are, perhaps, of no concern to this court.

It is well settled that, in the absence of proof to the contrary, an appellate court will presume that the inferior court has acted in accordance with the law and has based its decision upon grounds which were open to it to take, and which, if taken, would sustain its judgment.

> *Reinman* v. *Little Rock*, 237 U. S. 171, 180;
> *The S. B. Wheeler*, 20 Wallace 385, 386;
> *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 25;
> *Bankers' Trust Co.* v. *Missouri, K. & T. Ry. Co.*, 251 Fed. 789, 797, C. C. A., 8th Cir. (1918), Opinion by Sanborn, C. J.

In *Reinman* v. *Little Rock, supra*, Mr. Justice Pitney said, at page 180:

> "If the record, including the opinion, leaves it a matter of doubtful inference upon what basis of fact the state court rested its decision of the Federal question, it seems to us very plain, upon general principles, that we ought to assume, so far as the state of the record permits, that it adopted such a basis of fact as would most clearly sustain its judgment."

In *The S. B. Wheeler, supra,* Mr. Justice Waite said, at page 386 (italics ours):

> "There is no dispute as to the law. Two courts have already found against the appellants. It has been over and over again ruled by this court that under such circumstances the burden is on the appellants to show the error. *Every presumption is in favor of the decree below.* We ought not to reverse unless the error is clear. Such is not the case here."

The Supreme Court of Appeals handed down no opinion upon entering the decree in controversy, but the presumption that in making its decision it did so upon the ground that the Act was not severable is strongly supported by the language of the decree, which says, in part:

> "The court having maturely considered the mandate of the Supreme Court of the United States, filed and entered of record in this cause, and the record of the decree aforesaid (referring to the decree of the Circuit Court), is of opinion that there is no error in said decree."

And it then proceeds to affirm the decree of the Circuit Court. But that decree was based solely upon the ground that the Act was not severable as between interstate and intrastate commerce, and that, being void as to interstate commerce, the entire Act fell.

If it be urged that this position is inconsistent with the position taken by the Supreme Court of Appeals of West Virginia, in its original decision, the answer is that the Act, as then construed by the Supreme Court of Appeals, was held to apply to all the gas produced in West

Virginia by the defendant in error and delivered to other companies for transportation by the latter outside the State. Upon that point, however, the Supreme Court of Appeals was reversed by this court, and after such reversal the percentage of the entire quantity of gas transported in the State which might by any possibility remain subject to the tax was greatly lessened, so that a new question of severability was presented to the Supreme Court of Appeals after such reversal. The situation then was similar to that in *Comanche Light & Power Co.* v. *Nix*, 53 Okla. 220, in which the Supreme Court of Oklahoma had under consideration an Act which had theretofore been held by this court, in *Meyer* v. *Wells, Fargo* (223 U. S. 298), to be invalid as to interstate commerce.

In the *Comanche* case it was claimed by the Attorney General of that State that the Act was severable, and that, so far as it affected corporations operating wholly within the State, it should be sustained. Quoting from *Pollock* v. *Farmers Loan & Trust Co.*, at page 636 of that case, the Oklahoma Court said, at page 228:

> "What was there said applies with equal force here. To say that the Legislature intended, notwithstanding the plain language of the statute, that in any event those corporations doing business wholly within the state should pay the tax, while the great majority of the transportation and transmission and other companies doing business should be relieved of its onerous provisions, would be to impute to the Legislature a purpose violative of the spirit, if not the letter, of the organic law,

requiring that taxes shall be uniform upon the same class of subjects. The statute provided a comprehensive scheme or system of taxation, binding alike on all within its terms. As it remains, the result aimed at cannot be accomplished, for there can be no room for doubt that the destruction of the part of the statute stricken down would produce results neither contemplated nor desired by the Legislature. When such is the case, the only thing that remains is to hold the remainder of the statute inoperative and void."

Point II.

THE FINAL DECREE OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, NOW UNDER REVIEW, DOES NOT CONFLICT IN ANY RESPECT WITH THE MANDATE OF THIS COURT, AND RELATED SOLELY TO A MATTER UPON WHICH ITS JURISDICTION IS FINAL. NO FEDERAL QUESTION IS NOW INVOLVED, THEREFORE THE WRIT OF ERROR SHOULD BE DISMISSED OR THE DECREE OF THE SUPREME COURT OF APPEALS AFFIRMED, AND THE PENDING PETITION FOR A WRIT OF CERTIORARI DENIED.

Schneider Granite Co. v. *Gast Realty Co.*, 245 U. S. 288, 290;
Meyer v. *Wells, Fargo & Co.*, 223 U. S. 298, 302;
Berea College v. *Kentucky*, 211 U. S. 45;
People v. *Knapp*, 230 N. Y. 48.

The court below, after receiving the mandate of this court following its decision upon the first writ of error, had to determine anew whether the Legislature would have enacted, as a separate proposition, a statute levying a tax upon a comparatively small part of the business originally attempted to be taxed, and this was, under the authorities above cited, clearly a matter for the final decision of the highest court of the State.

In *Schneider Granite Co.* v. *Gast Realty Co., supra*, after the mandate from this court went down, the Supreme Court of Missouri held that the tax was severable, and entered a decree accordingly. Its action in so doing was approved in this court, upon the second appeal, Mr. Justice Pitney saying (245 U. S. 290) (italics ours):

> "The landowners insist that the two elements were inseparable, and that the tax, being void in part, was entirely void. But the Supreme Court of the State held in this case, following *Collier Estate* v. *Western Paving & Supply Co.*, 180 Missouri 362, 375, that the tax was severable. *This, like the kindred question of the severability of a statute of the State, is a question of state law.* See *Guinn* v. *United States*, 238 U. S. 347, 366; *Myers* v. *Anderson*, 238 U. S. 368, 380."

While in this case the lower court held the tax to be severable, yet it could with equal right have held that it was not severable. The right to affirm implies the right to deny.

In *People* v. *Knapp, supra*, which was decided November, 1920, Judge Cardoza, at page 60, referring to the

decision of this court in *Meyer* v. *Wells, Fargo & Co., supra,* says:

> "Even there it was recognized that the propriety of severance was a subject upon which the state court would speak with final authority, since in last analysis it was a question of the legislative purpose. * * * The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part excluded, or rejected altogether"

For the foregoing reasons, it is respectfully submitted that the question on which the decision of this case depends is so frivolous as not to need further argument; that the writ of error should be dismissed or the judgment of the Supreme Court of Appeals of West Virginia affirmed, and the motion for a writ of certiorari herein denied.

MALCOLM JACKSON,
R. G. ALTIZER,
Attorneys for Defendant in Error (Respondent).

APPENDIX.

DECISION ON FIRST WRIT OF ERROR.

UNITED FUEL GAS COMPANY, Plff. in Err.,

v.

WALTER S. HALLANAN, State Tax Commissioner of the State of West Virginia, and E. T. England, Attorney General of the State of West Virginia.

[No. 276.]

Argued November 9 and 10, 1921. Decided December 12, 1921.

IN ERROR, and PETITION for Certiorari, to the Supreme Court of Appeals of the State of West Virginia to review a decree which modified, and, as modified, affirmed, a decree of the Circuit Court of Kanawha County, in that state, enjoining the enforcement of a license tax upon a gas company. Petition for writ of certiorari dismissed. Decree reversed on writ of error.

See same case below, — W. Va. —, 105 S. E. 506.

The facts are stated in the opinion.

Messrs. Malcolm Jackson and R. G. Altizer for Plaintiff in error.

Messrs. William Gordon Mathews, Fred O. Blue, and

S. B. Avis, and Mr. E. T. England, Attorney General of West Virginia, for defendants in error.

Mr. Justice Holmes delivered the opinion of the court.

This is a bill in equity that seeks to restrain the application to the plaintiff of the same statute that has been considered in Eureka Pipe Line Co. v. Hallanan, just decided [— U. S. —, ante, 127, 42 Sup. Ct. Rep. —]. Acts of Extrairdinary Session, 1919, chap. 5. The statute taxes the transportation of natural gas as well as of oil by pipe lines, and the plaintiff gas company makes the same objection that was made by the oil company in the former case to the constitutionality of the act, as well as others that it will not be necessary to discuss. The two cases were heard together and were disposed of in a single opinion by the supreme court of appeals. The circuit court of the state held the statute void, but the supreme court, as before, upheld it as valid with regard to intrastate business "as above defined," and defined the plaintiff's business as intrastate. The plaintiff drew in question the validity of the statute "as construed and applied" (Merchants Nat. Bank v. Richmond, June 6, 1921 [(U. S. Adv. Ops. 1920-21, p. 717) — U. S. —, 65 L. ed. —, 41 Sup. Ct. Rep. 619]), and took this writ of error. It also filed a petition for a writ of certiorari. For the reasons given in the Eureka Case, the writ of error will be entertained and the petition for certiorari dismissed.

The case was heard upon the pleadings and a stipulation as to facts. It appears that the plaintiff gathers and purchases natural gas, mostly in West Virginia, and distributes it throuh its pipes, which extend to or beyond the state line in various places, and also connect with the pipes of other companies that extend beyond the

state. The total amount dealt with by the plaintiff in the year ending July 1, 1919, was 54,973,588 M cubic feet, of which all but a little over a million M cubic feet was gathered in West Virginia. There were sold directly to consumers in West Virginia 11,590,656 M cubic weet; a little over 10,000,000 M cubic feet to consumers in other states; and the remainder was sold to four connecting companies. It is admitted that the gas sold to one of these, the Ohio Fuel Supply Company, is transported in interstate commerce, so that that may be laid on one side. Another of them is the Columbia Gas & Electric Company. Ninety-nine per cent of the gas received by it is carried out of the state and sold, yearly. A third is the Pittsburgh-West Virginia Gas Company, which yearly disposes of 88 per cent of the gas in the same way. The fourth is the Hope Natural Gas Company, which in like manner carries 67 per cent of the gas bought from the plaintiff out of the state and sells it there.

In short, the great body of the gas starts for points outside the state and goes to them. That the necessities of business require a much smaller amount destined to points within the state to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers, after they receive it, might change their minds before the gas leaves the state, and that the precise proportion between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events make the carriage of the greater part as commerce among the states, and theoretical possibilities may be left out of account. There is no break, no period

of deliberation, but a steady flow, ending, as contemplated from the beginning, beyond the state line. Railroad Commission v. Worthington, 225 U. S. 101, 108, 56 L. ed. 1004, 1008, 32 Sup. Ct. Rep. 653; United States v. Reading Co., 226 U. S. 324, 367, 57 L. ed. 243, 257, 33 Sup. Ct. Rep. 90; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 113, 62 L. ed. 1006, 1015, 1 A.L.R. 1278, P.U.R.1918D, 865, 38 Sup. Ct. Rep. 438. We have mentioned only such facts as are sufficient for our decision, and have not noticed other objections urged against the law. What we have stated seems to us enough to condemn it as applied to this case.

Decree reversed.

Petition for certiorari dismissed.

Mr. Justice Brandeis dissents.

MANDATE.

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of the State of West Virginia, Greeting:

Whereas, lately in the Supreme Court of Appeals of the State of West Virginia, before you, or some of you, in a cause between Walter S. Hallanan, State Tax Commissioner, etc., et al., appellants and United Fuel Gas Company, appellee, No. 4201, wherein the judgment of the said Supreme Court of Appeals, entered in said cause on the 26th day of November, A. D., 1920, is in the following words, viz:

"The Court, having maturely considered the motion to reverse the decree aforesaid, the record thereof and the arguments of counsel thereon, is of opinion to, and for reasons stated in writing and filed with the record, and hereby doth, sustain said motion as to part of said decree and overrule said motion as to the remainder thereof. It is therefore adjudged, ordered and decreed that the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 14th day of September, 1920, in so far, and in so far only, as it decrees and holds the Transportation Act, mentioned and described in the bill and proceedings in this cause, being chapter 5 (House Bill No. 3) of the Acts of the Legislature of the State of West Virginia, extraordinary session held in 1919, to be void and perpetually inhibits, enjoins and

restrains the appellants from enforcing or atempting to enforce against the appellee, in any manner or respect, the provisions of said act in so far as the same apply to intrastate commerce as defined by the written opinion filed herein, be and the same hereby is set aside, reversed and annulled, and that in all other respects said decree be and the same hereby is affirmed, and that the appellee do pay to the appellants their costs about the prosecution of their appeal in this Court in this behalf expended: all of which is ordered to be certified to the Circuit Court of Kanawha County," as by the inspection of the transcript of the record of the said Supreme Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and twenty-one, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the Judgment of the said Supreme Court of Appeals in this cause be, and the same is hereby, reversed with costs; and that the said appellee, United Fuel Gas Company, recover against the said appellants Four Hundred and forty-nine dollars and seventy-five cents for its costs herein expended and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said Supreme Court of Appeals for further proceedings not inconsistent with the opinion of this Court. December 12, 1921.

And the same is hereby remanded to you, the said

Judges of the said Supreme Court of Appeals of the State of West Virginia, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this Court above stated, as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable William H. Taft, Chief Justice of the United States, and fourth day of February, in the year of our Lord one thousand nine hundred and twenty-two.

HALLANAN, STATE TAX COMMISSIONER, ET AL. *v.* UNITED FUEL GAS COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI AND IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

Nos. 570 and 886. Motion to dismiss or affirm submitted March 12, 1923.—Decided April 9, 1923.

Decided on the authority of *Hallanan* v. *Eureka Pipe Line Co.*, *ante*, 393.
Petition for certiorari (No. 570) denied.
Writ of error (No. 886) dismissed.

WRIT of error and petition for certiorari to review a judgment of the Supreme Court of Appeals of West Virginia, entered after the reversal of the same case by this Court in *United Fuel Gas Co.* v. *Hallanan*, 257 U. S. 277.

Mr. Edward T. England, Attorney General of the State of West Virginia, *Mr. S. B. Avis*, *Mr. Fred O. Blue* and *Mr. Wm. Gordon Mathews* for petitioners and plaintiffs in error.

Mr. Malcolm Jackson and *Mr. R. G. Altizer* for respondent and defendant in error.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This is a case like that of *Hallanan* v. *Eureka Pipe Line Co.*, just decided, *ante*, 393, involving the question

whether the Supreme Court of Appeals of West Virginia has complied with the mandate of this Court issued on a judgment entered in the case of *United Fuel Gas Co.* v. *Hallanan*, decided December 12, 1921, 257 U. S. 277. It is in all respects similar to that in *Eureka Pipe Line Co. Case* and requires the same judgment.

The petition for the writ of certiorari is denied and the writ of error is dismissed.